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Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover

Unhealthy foods, non-communicable diseases and the right to health

Summary

In the report submitted to the Human Rights Council pursuant to its resolution 24/6, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health draws links between unhealthy foods and diet-related non-communicable diseases (NCDs). The Special Rapporteur highlights the urgent need for States to address structural changes in the food environment, which negatively impact individuals' enjoyment of the right to adequate and nutritious food – an underlying determinant of the right to health. Global trade, increased foreign direct investment (FDI) in the food sector and the pervasive marketing of unhealthy foods have increased the consumption of unhealthy foods, which have been linked to diet-related NCDs.

The Special Rapporteur outlines a number of policies to increase the availability and accessibility of healthier food options, including through fiscal policies and the regulation of marketing and promotion of unhealthy foods, as well as increasing information and awareness about the health risks posed by unhealthy foods. He observes States' obligations in ensuring the respect, protection and fulfilment of the right to health, and points to the responsibilities of the food industry in refraining from producing, marketing and promoting unhealthy foods. He also stresses the need for various accountability and remedial mechanisms by which individuals can seek redress to violations of their right to health, and underlines the importance of international assistance and cooperation in the prevention and reduction of the increasing burden of diet-related NCDs.

The Special Rapporteur concludes his report with a set of recommendations, aimed

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at States and the food industry, to take concrete steps to reduce the production and consumption of unhealthy foods and increase the availability and affordability of healthier food alternatives.

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I. Introduction

1. The right to health not only embraces within its scope such underlying determinants of health as an adequate supply of safe food, but its realization is also inextricably linked to the fulfilment of the right to food. Access to nutritiously safe food as an underlying determinant of the right to health is connected with the concepts of food security and nutrition security. Food security is defined by the Food and Agriculture Organization of the United Nations as the situation where "all people, at all times, have physical and economic access to sufficient, safe and nutritious food necessary to meet their dietary needs and food preferences for an active and healthy life".[1] The Committee on the Economic, Social and Cultural Rights has held that one of the core State obligations under the right to health includes ensuring "access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone".[2] On the legal obligations under the right to food, the Committee similarly observed that: "Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."[3] This concomitant obligation is increasingly important, as unhealthy foods have been implicated in the growing global burden of NCDs.

2. More than 36 million people die from NCDs every year. NCDs have outstripped communicable diseases as the leading cause of death in most parts of the world. Four main diseases – cardiovascular diseases, cancers, chronic respiratory diseases and diabetes – account for a majority of NCD-related deaths. Unhealthy diets are one of the primary modifiable risk factors associated with NCDs and account for 2.7 million deaths annually.[4] Low- and middle-income countries suffer a greater burden of NCD mortality, with 80 per cent of all NCD deaths occurring in these countries.[5] Unhealthy diets are also linked to high rates of obesity, a growing global epidemic that kills around 2.8 million people a year and is a known risk factor for NCDs.[6]

3. Diets high in intake of foods such as burgers, pizzas, red meats, crisps, biscuits, salty snacks, sugary drinks that contain high levels of sugar, salt, trans-fats and saturated fats are known to pose a greater risk for obesity and NCDs.[7] Most of these foods are ultraprocessed,[8] ready to eat but energy-dense and containing empty calories devoid of nutritional value. Unhealthy foods consumed in small quantities and in addition to healthier sources are not necessarily harmful to health. However, given their high availability and

[1] FAO, World Food Summit Plan of Action, para. 1 (1996).

[2] CESCR, General Comment No. 14, E/C.12/2000/4, para. 43(b).

[3] CESCR, General Comment No. 12, E/C.12/1999/5, para. 14.

[4] World Health Organization (WHO), "Unhealthy diets & physical inactivity", NMH Fact Sheet, June 2009. Available from http://www.who.int/nmh/publications/fact_sheet_diet_en.pdf.

[5] WHO, *Global Status Report on Noncommunicable Diseases 2010* (Geneva, 2010, reprinted in 2011), p. 9.

[6] WHO, "10 facts on obesity", available from http://www.who.int/features/factfiles/obesity/facts/en/index1.html.

[7] M. Tokunaga *et al.*, "Diets, nutrients and noncommunicable diseases", *The Open Nutraceuticals Journal*, vol. 5 (2012), p. 152.

[8] Rob Moodie *et al.*, "Profits and pandemics: prevention of harmful effects of tobacco, alcohol, and ultra-processed food and drink industries", *The Lancet* (2013), vol. 381, No. 9867, p. 671: "Ultra-processed products are made from processed substances extracted or 'refined' from whole foods – e.g. oils, hydrogenated oils and fats, flours and starches, variants of sugar, and cheap parts or remnants of animal foods – with little or no whole foods."

palatability, and due to aggressive marketing, they have replaced healthier foods in diets.[9] This is a particularly worrying trend for low- and middle-income countries, as the rate of consumption of unhealthy foods for such countries is projected to outpace high-income countries.[10] While excess calories consumed from unhealthy foods may be expended through physical activity, the shift in technology from labour-intensive to service-oriented occupations and changes in modes of transportation have resulted in sedentary lifestyles and thereby reduced physical activity and energy expenditure.[11]

4. The processes of globalization, in particular trade and FDI in food processing, retailing, and food advertising and promotion, have been increasingly associated with driving shifts in dietary patterns towards those closely linked with NCDs.[12] This is also demonstrated in the increasing presence of transnational food and beverage companies in a number of countries, particularly developing countries, and their pervasive marketing of unhealthy foods.[13] While public policy responses are critical to addressing unhealthy diets by focusing on population-wide responses that alter purchasing and consumption patterns, there has been much less emphasis on addressing structural changes to the food system that largely affect people's diets.[14]

II. Impact of globalization on food systems

5. The policies of globalization have played an important role in increasing the free flow of unhealthy foods between countries. Changes in the food system are now largely driven by transnational corporations (TNCs), including food and beverage companies and supermarket chains, which have altered diets from traditional and minimally processed foods to ultraprocessed ones. In fact, 75 per cent of the world's food sales constitute processed foods, whose largest manufacturers control more than one third of the global market.[15] TNCs have therefore been a critical link in the transition from minimally processed to ultraprocessed foods. They also greatly influence the sale and consumption of unhealthy foods in comparison to promoting the availability and affordability of healthy foods within the food system.[16]

6. Industrial technology has contributed to the dominance of TNCs in the modern food system. The use of agrochemicals and hybrid seeds in farming and extraction technology in food processing have allowed for large-scale food production at substantially lower costs.[17] The addition of high amounts of salts, saturated- and trans-fats to ultraprocessed foods have

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[9] *Ibid.*, pp. 671–672.

[10] David Stuckler *et al.*, "Manufacturing epidemics: the role of global producers in increased consumption of unhealthy commodities including processed foods, alcohol and tobacco", *PLOS Medicine*, vol. 9, No. 6 (2012), p. 2.

[11] Barry M. Popkin, "Global nutrition dynamics: the world is shifting rapidly toward a diet linked with noncommunicable diseases", *American Journal of Clinical Nutrition*, vol. 84, No. 2 (2006), pp. 289–298.

[12] Corinna Hawkes, "Uneven dietary development: linking the policies and processes of globalization with the nutrition transition, obesity and diet-related chronic diseases", *Globalization and Health*, vol. 2, No. 4 (2006).

[13] *Global Status Report on Noncommunicable Diseases 2010* (see footnote 5 above), Chapter 2, NCDs and Development, p. 33.

[14] Sharon Friel *et al.*, "Measuring progress on diet-related NCDs: the need to address the causes of the causes", *The Lancet* , vol. 381, No. 9870 (2013), pp. 903–904.

[15] "Profits and pandemics" (see footnote 8 above), pp. 671–672.

[16] "Manufacturing epidemics" (see footnote 10 above), pp. 1–2.

[17] Tim Lang, "Food industrialisation and food power: implications for food governance", Gatekeeper Series No. 114 (International Institute for Environment and Development, 2004), pp. 4–5.

increased the shelf life of such foods and reduced transportation costs, making them more profitable.

7. The 1980s "structural adjustment programmes" of the International Monetary Fund and the World Bank compelled developing countries to open up their markets, including the food sector, to foreign trade as a part of loan fulfilling conditions. Agreements negotiated at the World Trade Organization sought further market integration by reducing tariffs and non-tariff barriers to trade, curtailing export subsidies and removing protections of domestic industry to promote the freer flow of goods and services.[18] These policies were implemented as a means of increasing the efficiency of the food system in producing the foods that people needed and wanted, but they had significant effects on the types of available foods and their costs. As a result, there has been a drastic increase in production of certain products relative to others. For example, there was a substantial increase in the global production of vegetable oils such as partially hydrogenated soybean oil, a source of trans-fats, and palm oil, a source of saturated fats.[19] Similarly, grains such as corn are produced in larger quantities to cater to the food processing industry to produce sweeteners like high-fructose corn syrup, substantially increasing global calorie consumption from such sweeteners (A/HRC/19/59, pp. 13–14). Studies show that countries adopting market deregulation policies experience a faster increase in unhealthy food consumption and mean body mass index, an indicator of obesity.[20] In furthering the goals of market expansion and profits, critical focus areas of health such as diets and nutrition have not been given due consideration.[21]

8. Rise in levels of FDI in the processed foods sector is one such factor that allows for greater exposure to unhealthy foods in low- and middle-income countries.[22] FDI is one of the mechanisms by which TNCs enter developing countries. FDI enables companies to purchase or invest in food-processing companies in other countries, which then produce processed foods for the domestic market. This circumvents import tariffs on processed foods and reduces the cost of transportation. FDI has been more crucial than trade in increasing sales of processed foods in developing countries.[23] For example, in some emerging markets, the processed food industry is amongst the top sectors attracting FDI.[24] Most of the sales for popular soft drink and fast food brands also come from developing countries.[25]

9. Supermarkets and large food chains have largely replaced fresh food markets as a major source of food supply in most countries,[26] and at a faster rate in developing than

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[18] Corinna Hawkes *et al.*, "Linking agricultural policies with obesity and noncommunicable diseases: a new perspective for a globalising world", *Food Policy*, vol. 27 (2012), pp. 344–345.

[19] *Ibid.*, p. 345.

[20] Roberto De Vogli *et al.*, "The influence of market deregulation on fast food consumption and body mass index: a cross-national time series analysis", *Bulletin of the World Health Organization*, vol. 92 (2014), pp. 99–107A.

[21] "Diets, nutrients and noncommunicable diseases" (see footnote 7 above), p. 148.

[22] "Manufacturing epidemics" (see footnote 10 above), p. 5.

[23] Corinna Hawkes, "The role of foreign direct investment in the nutrition transition", *Public Health Nutrition*, vol. 8, No. 4 (2005), pp. 357–365.

[24] Kakali Majumdar, "Foreign direct investment in Indian food processing industry", *Asian Journal of Research in Business Economics and Management*, vol. 2, No. 4 (April 2012), p.113. Available from http://www.ajsh.org/setup/business/ paper139.pdf.

[25] Corinna Hawkes, "Marketing activities of global soft drink and fast food companies in emerging markets: a review", *Globalization, Diets and Noncommunicable Diseases* (Geneva, WHO, 2002), p. 1.

[26] Barry M. Popkin *et al.*, "The global nutrition transition and the pandemic of obesity in developing countries", *Nutrition Reviews*, vol. 70, No. 1 (2012), p. 8.

developed countries.[27] Supermarkets based in North America and Europe have invested heavily in Africa, Asia, Central and Eastern Europe and Latin America. Supermarkets are now the primary food retailers in Latin America.[28] In one country, approximately three quarters of the FDI flows towards highly-processed foods like soft drinks, snacks and mayonnaise.[29]

III. Promotion and marketing of unhealthy foods

10. Global food promotion, marketing and advertising are closely linked with globalization, leading to dietary transitions towards unhealthy foods. The aim of food marketing is to increase demand for products by making people develop the habit of consuming the product regularly. Aggressive expansionist strategies pursued by TNCs in emerging economies over the last few decades have increased the visibility and familiarity of global food brands, which are then leveraged to increase consumption of these products. Specific marketing tools are used to increase consumption by ensuring the presence of global food brands in as many places as possible at affordable prices, while expanding the variety of their products to suit local tastes and purchasing capacities. In order to cater to some rural areas and low-income populations, soft drink companies have invested in smaller bottles at lower prices to create acceptability of the product. In other places, portion sizes are increased to encourage greater consumption.[30] At an individual level, increased purchasing power and the convenience of ready-to-eat products promote the consumption of unhealthy foods. At a population level, the aggressive and systematic marketing strategies used by TNCs fuel this demand.[31]

11. The food industry spends billions of dollars on persistent and pervasive promotion and marketing of unhealthy foods. TNCs often enter into exclusive contracts with fast food outlets to sell their foods. Varied pricing strategies are used as a mechanism to elicit demand for unhealthy products. Supermarkets have also been found to provide more price discounts for unhealthy foods compared to healthy foods.[32]

IV. State obligations to respect, protect and fulfil the right to health

12. With respect to the availability and accessibility of nutritionally adequate and safe food, both the right to health and the right to food cast obligations on States. Under the right to health framework, States have a core and non-derogable obligation to ensure access to the minimum essential food that is nutritionally adequate to ensure freedom from hunger for everyone. Pertinently, the right to food framework requires States to ensure the availability and accessibility of food in a quantity and quality to satisfy the individuals'

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[27] Abay Asfaw, "Supermarket purchases and the dietary patterns of households in Guatemala", IFPRI Discussion Paper 00696 (Washington D.C., International Food Policy Research Institute, 2007), p. 1.

[28] Ronald Labonté *et al.*, "Framing international trade and chronic disease", *Globalization and Health*, vol. 7, No. 21 (2011), p. 3.

[29] "The role of foreign direct investment in the nutrition transition" (see footnote 24 above), p. 360.

[30] "Marketing activities of global soft drink and fast food companies ..." (see footnote 26 above), pp. 8–12.

[31] "Profits and pandemics" (see footnote 8 above), p. 372.

[32] University of East Anglia, "Supermarket offers: a healthy choice for consumers?", 21 November 2012. Available from http://www.uea.ac.uk/mac/comm/media/press/2012/November/supermarkets-offers-paul-dobson.

dietary needs, and which contain a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages of life.

13. The International Covenant on Economic, Social and Cultural Rights provides for progressive realization of the right to health, which means that States have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of the highest attainable standard of health. States should therefore formulate a time-bound plan by taking immediate and continuing steps to the maximum of their available resources. This obligation can be fulfilled, *inter alia*, by formulating polices related to health, as well as to sectors such as trade and agriculture. In particular, the right to health framework requires States to take measures to prevent diet-related NCDs and provide equal and timely access to primary health care. Thus, in order to ensure the three types of obligations under the right to health, namely to respect, protect and fulfil it, States should not only provide nutritious food, but also institute measures in all areas of policymaking to reduce the burden of diet-related NCDs.

14. The obligation to respect the right to health is a negative duty of the State to refrain from interfering with people's enjoyment of their right to health. It recognizes the right and autonomy of individuals to make informed decisions with respect to their health. The obligation not to intervene in individual decision-making does not, however, imply a disengaged approach by States towards laws and policies concerning the food industry. Feasible alternatives should be made available and accessible to individuals from which to choose a healthy diet.

15. States also have the obligation to protect people from violations of their right to health from activities of non-State actors, including private food corporations. For instance, States should make sure that advertisements and promotion by food corporations convey accurate and easily understandable information on possible ill effects of their food products. This is important, as withholding or misrepresenting such information is likely to affect people's diet choices, which impacts on the right to health.

16. Fulfilling the right to health is a positive obligation that requires States to adopt a national public health strategy and plan of action towards achieving the highest attainable standard of health. States also have the duty to ensure that information relating to healthy diets is accurate and available to encourage informed choices. In recognizing the close links between food and health, States would need to formulate multisectoral policies that positively affect the availability and accessibility of healthy foods. For instance, States may need to modify their food and agricultural, trade and fiscal policies. Such policies should take into consideration epidemiological evidence of diet-related NCDs and should be implemented and monitored through indicators and benchmarks. However, States should ensure that regulations do not unduly harm small-scale industries. Although it is necessary to ensure that foods produced by small-scale industries are neither unhealthy nor unsafe, regulatory requirements may disproportionately burden them. Alternative approaches, such as community and peer education among consumers as well as small-scale food manufacturers, may be more effective in persuading them to produce healthier foods. For instance, some States have successfully used peer education models in getting street-food vendors to replace harmful vegetable oils with healthier options.

A. Information and awareness-raising

17. As a step to progressively realizing the right to health, States should formulate and regularly update food and nutrition guidelines for a healthy diet for different groups, particularly for vulnerable groups, like children, women and low-income groups. Guidelines should be formulated based on scientific evidence and with the participation of

the community, civil society organizations and other stakeholders. To be effective, dissemination of these guidelines and nutritional information to people in a comprehensible manner is equally important. One regulatory approach that States should consider is the adoption of nutrient profiling models, in which foods are ranked according to their nutritional composition.

18. Education and public awareness programmes can help the population make healthier food choices. Consumer-friendly labelling of food products is a common method to raise awareness and encourage consumers to make informed decisions about their diets. For instance, some States have issued guidance for supermarkets and food and beverage companies to use images such as front-of-pack, "traffic light" food labelling.[33] This creates awareness about healthier food options, impacting positively consumer choice. Traffic light food labelling makes use of red, amber and green colours to indicate high, medium and low content, respectively, of a particular nutrient. As children are particularly vulnerable to increased risk of NCDs in adulthood due to the consumption of unhealthy foods, States should involve schools in teaching children about the benefits of healthy foods in a child-friendly manner.

B. Fiscal policies

19. To reduce the intake of unhealthy foods, States should adopt policies to create disincentives for consuming them. For instance, some States have levied a consumption tax on sugar-sweetened beverages to curb the obesity epidemic, with the revenue raised from sales to be spent on providing drinking water.[34] However, merely increasing the price of unhealthy foods may have a punitive effect on low-income groups. Reducing the price of nutritious food to levels cheaper than or comparable to unhealthy foods would make healthy foods more affordable. For instance, agricultural subsidies benefiting unhealthy foods could be removed and shifted to subsidies for increasing the production of healthier foods. States could take measures, such as tax benefits and focused investments in agricultural production, to incentivize farmers to produce healthier foods like vegetables and fruits (A/HRC/19/59).

20. Procurement policies could be used to encourage farmers to produce fruits and vegetables, guaranteeing profits and making more nutritious diets affordable for low-income groups. For instance, some countries procure food grains at market rates directly from farmers that they then sell to low-income groups at affordable rates, balancing the interests of the farmer and a vulnerable group. Another measure adopted by States has been to encourage localized farming and then procure the produce for schools. This not only enhances local economic development, but also ensures the reduction of unhealthy foods among schoolchildren.[35]

21. Accessibility of healthy foods may not necessarily lead to their higher intake. Even though foods with high nutrition value may be available in areas and spaces alongside less nutritious foodstuffs, consumers may not be attracted to the healthier option based on

[33] NHS Choices, "Food labels", 19 June 2013, available from http://www.nhs.uk/Livewell/Goodfood/Pages/food-labelling.aspx.

[34] Sarah Boseley, "Mexico enacts soda tax in effort to combat world's highest obesity rate", *The Guardian*, 16 January 2014, available from http://www.theguardian.com/world/2014/jan/16/mexico-soda-tax-sugar-obesity-health.

[35] World Food Programme, *Brazil: a Desk Review of the National School Feeding Programme* (July 2007). Available from http://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp207419.pdf.

various factors such as perceived palatability or lack of visibility of healthier options and their benefits. Retail stores and supermarket chains may stock healthy foods, but lesser shelf-space may be allocated to them or they may be placed at the back of the store.[36] This would have a negative effect on consumption patterns in favour of healthier foods. To rectify this, States could urge and require retailers to arrange their products in ways that would attract the consumer to healthier options. States could also promote healthier foods through media and social channels traditionally used by food and beverage companies, from television to Internet advertisements.

C. Policies on marketing and promotion of unhealthy foods

22. To prevent harm to people's health and fulfil their obligation under the right to health, States should put in place national policies to regulate advertising of unhealthy foods. States should formulate laws and a regulatory framework with the objective of reducing children's exposure to powerful food and drink marketing. Such regulations should ensure that the food industry provide accurate and reader-friendly nutrition information when advertising their products.

23. To address the issue of aggressive marketing, some States have supported self-regulation and have allowed food companies to voluntarily regulate their practices related to marketing and nutritional content of unhealthy foods to children.[37] Companies often voluntarily adopt self-formulated guidelines and standards to restrict Government regulation and respond public demands. They have also taken joint initiatives and formulated guidelines for member companies to restrict advertising and promoting practices with respect to children. However, self-regulation by companies has not had any significant effect on altering food marketing strategies.[38] Due to a variety of reasons, such as the non-binding nature of such self-regulation, lack of benchmarks and transparency, inconsistent definition of children and different nutrition criteria, companies may be able to circumvent guidelines, blunting the intended effect of marketing guidelines they instituted.

24. Collaboration between Governments and food corporations has been recommended as an alternative to self-regulation. One of the major reasons cited for promoting partnerships between private food companies and Governments is that food corporations have the ability to promote healthier dietary habits and are therefore a part of the solution to reduce and prevent the obesity epidemic.[39] However, the conflict of interest between the State's duty to promote public health and companies' responsibility towards their shareholders to increase profits renders private–public partnership suspect. In addition, the close relationship between food and beverage companies and Government agencies may lead to a lack of transparency and independence of regulatory authorities, which may

[36] Heart Foundation, *The Supermarket as an Environment for Facilitating Dietary Behaviour Change* (June 2012), pp. 14–15. Available from http://www.heartfoundation.org.au/SiteCollectionDocuments/NHF-Supermarket-rapid-review-FINAL.pdf.

[37] Executive Office of the President of the United States, *Solving the Problem of Childhood Obesity within a Generation: White House Task Force on Childhood Obesity Report to the President*, (Washington D.C., May 2010), Recommendation 2.5. Available from http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf.

[38] WHO, *Marketing Food to Children: the Global Regulatory Environment* (Geneva, 2004), p. 13.

[39] Institute of Medicine of the National Academies, *Building Public–Private Partnerships in Food and Nutrition* (Washington D.C., 2012), pp. 9–22. Available from http://www.ncbi.nlm.nih.gov/books/NBK97331/pdf/TOC.pdf.

undermine the effectiveness of public–private partnerships in States' efforts to reduce diet-related NCDs.

25. Owing to the inherent problems associated with self-regulation and public–private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people's health. Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health. To reduce opportunities for targeted advertisements, some States have instituted laws to ban companies from advertising their products to children below a certain age and to limit the availability of unhealthy foods in schools.[40]

D. Policies on foreign direct investments

26. TNCs that manufacture and sell processed foods are making their presence felt globally by reaching consumer groups, which transcend national boundaries through FDI and international trade agreements, thus impacting on the health of transboundary populations. Recognizing this, States need to bring these companies within their regulatory framework. States may impose health-related conditions on investments by TNCs and require them to adhere to domestic standards on nutrition, advertisement and marketing.[41] For instance, States may condition investments by foreign retail chains on a requirement to make available healthy foods in their stores.

27. However, regulating FDI by TNCs through conditions on the kind of food they produce may affect the decision of TNCs to invest in these States.[42] Some States, especially low- and middle-income countries that rely on foreign investments may not be able to impose health- or diet-related conditions. States may therefore not give primacy to the health of the population, undermining the full realization of the right to health. There is a need to use other approaches, such as incentivizing the manufacture and sale of healthier alternatives, to protect the right to health of people and still attract FDI.

V. Responsibilities of the food and beverage industry

28. Although international human rights instruments refer to States as primary duty-bearers, non-State actors are also charged with the responsibility to respect the right to health. The International Covenant on Economic, Social and Cultural Rights prohibits the violation of human rights enshrined therein not only by States, but also by any "group or person", clearly implicating the responsibility of non-State actors in the realization of human rights (article 5). The right to health framework further crystalizes this position and provides that while only State parties to the Covenant are thus ultimately accountable for compliance with it, all members of society as well as the private business sector have

[40] Barbara Fraser, "Latin American countries crack down on junk food", *The Lancet*, vol. 382, No. 9890 (August 2013), pp. 385–386.

[41] "The role of foreign direct investment in the nutrition transition" (see footnote 24 above), p. 363.

[42] Neal H. Hooker and Julie A. Caswell, "Trends in food quality regulation: implications for processed food trade and foreign direct investment", *Agribusiness*, vol. 12, No. 5 (September/October 1996), pp. 411–419.

responsibilities regarding the realization of the right to health. In the context of business corporations and TNCs, several guidelines have been adopted internationally that clarify that business corporations and TNCs have the responsibility to respect human rights, which includes the right to health.[43] The responsibilities of business enterprises are independent of the State's obligations to realize its obligations towards human rights and also of corporations' obligations to comply with national laws and regulations.[44]

29. The responsibility to respect the right to health requires the food industry to refrain from engaging in activities that negatively impact the right of people to the highest attainable standard of health. Where States have enacted legislation as part of national health policies to discourage consumption of unhealthy foods and promote healthier options, the food industry has the responsibility to comply with such laws and desist from undertaking activities that would undermine these policies. They should take measures to prevent, mitigate and remedy adverse impacts of their actions. For example, in light of the negative impact of food marketing and promotion activities on children's diets, the food industry has the responsibility to refrain from advertising unhealthy products to children in accordance with national laws and regulations. Failure to exercise such restraint under domestic law may amount not only to a violation of the law, but also of the right to health. Similarly, the food industry should desist from promoting false or misleading health claims about their products, consistent with their responsibility to respect the right to health. Health claims about food products have often been shown to be unverifiable and deceptive about relative health benefits. Moreover, even where unhealthy ingredients like sugar and fat content are replaced with refined starch and promoted as "healthier" food options, they are still processed foods with minor improvement in nutritional quality.[45]

30. Studies have shown that the food industry uses various strategies to undermine public health nutrition efforts. For example, the food industry hires prominent academics for their advisory boards, which may result in findings being more favourable towards the food industry, with the danger that the food industry may use such biased findings to support its claims on nutrition.[46] Other tactics include the funding of front groups (that appear independent, yet are controlled by other organizations), lobbying and instituting lawsuits and threats thereof.[47] It has also been shown that, under the guise of corporate social responsibility to meet their ethical obligations towards society at large, big soft drink companies have attempted to shift the burden of the responsibility to make healthier choices onto consumers instead of addressing their role in creating an unhealthy food environment. Furthermore, corporate social responsibility has also been used by the big soft drink industry as a means to thwart attempts at government regulation and increase sales of their products, particularly to children.[48] Such acts result in a negation of the right to health.

31. As the food industry plays a key role in the global food environment and is recognized as the primary driver of diet-related NCDs, it has a distinct responsibility to take

[43] E/CN.4/Sub.2/2003/12/Rev.2. See also HR/PUB/11/04.

[44] HR/PUB/11/04, Principle II, A.11.

[45] Marion Nestle and David S. Ludwig, "Front-of-package food labels: public health or propaganda?", *Journal of the American Medical Association*, vol. 303, No. 8 (2010), p. 772.

[46] Kelly D. Brownell and Kenneth E. Warner, "The perils of ignoring history: big tobacco played dirty and millions died. How similar is big food?", *The Milbank Quarterly*, vol. 87, No. 1 (2009), pp. 278–279.

[47] See Dr. Margaret Chan, Director-General of WHO, opening address at the Eighth Global Conference on Health Promotion, Helsinki, 10 June 2013. Available from http://www.who.int/dg/speeches/2013/health_promotion_20130610/en/.

[48] Lori Dorfman *et al.*, "Soda and tobacco industry corporate social responsibility campaigns: how do they compare?", *PLOS Medicine*, vol. 9, No. 6 (2012), pp. 3–4.

steps to realize the right to health. While many challenges facing the food system, like environmental pressures such as draughts and floods, are out of the control of the food industry, there are several areas where it can make a positive impact on health by investing in and influencing healthier food choices. To this end, the industry should consider adopting standards to improve the nutritional quality of foods through product reformulation and to improve labelling and information on their products to contribute to healthier diets. The food industry should also invest in research to improve the nutritional content of their products rather than investing in increasing the marketability of existing products.[49] Furthermore, supermarkets and fast food restaurants should take steps to market and promote healthier options. For example, in addition to providing calorie content of meals on menu cards, fast food restaurants should adopt appropriate nutrient profiling models that indicate the nutritional composition of the foods available.

32. In furthering their responsibility to respect the right to health, the food industry should ensure the transparency of nutritional information and composition, an area where thus far the efforts of the food industry have been woefully lacking. The food industry should take concrete steps to ensure that consumers have sufficient nutritional information about their products to aid and promote more responsible dietary decisions. Moreover, creating and implementing mechanisms that promote disclosures of conflicts of interest within their governance structures can contribute towards efforts to ensure transparency of the operations of the food industry. This is of particular relevance where global health funders, who are also non-State actors, are shareholders or sit on the governance boards of the food industry or vice versa.[50]

VI. Vulnerable groups

33. States have a core obligation to protect the right to health of vulnerable and marginalized groups. The present report focuses on three particular groups: children, because of their greater susceptibility to marketing; women, because gendered marketing perpetuates traditional and unequal gender roles; and low-income groups, because healthy food options are not readily available or accessible to them. Other individuals or communities may also face higher risks of diet-related NCDs due to race, gender, indigenous status or place of residence, as well as because of multiple or intersecting vulnerabilities.

A. Children

34. Despite the common association of NCDs with older persons, children are also affected by the full range of NCDs, including heart disease, cancer and diabetes, and by their risk factors such as being overweight or obese.[51] Diet-related NCDs and obesity affect even very young children. For instance, of the 500 million obese people worldwide in 2008,

[49] Marion Nestle and Ted Wilson, "Food industry and political influences on American nutrition", in *Nutritional Health: Strategies for Disease Prevention*, N J Temple *et al.* (eds.), 3rd ed. (Humana Press, 2012), p. 480.

[50] David Stuckler *et al.*, "Global health philanthropy and institutional relationships: how should conflicts of interest be addressed?", *PLOS Medicine*, vol. 8, No. 4 (2011), p. 7.

[51] NCD Alliance, "A focus on children and non-communicable diseases (NCDs)", position paper prepared for the United Nations Summit on Non-Communicable Diseases, New York, September 2011, p. 5.

more than 42 million were children under the age of five, with 35 million of those children in developing countries.[52]

35. Children are particularly vulnerable to diet-related NCDs either because they may be dependent on others, such as parents or schools, for food, or because they are more susceptible to marketing pressures.[53] In addition, unhealthy childhood diets can have severe health consequences later in life because of the early formation of eating habits and preferences and also because childhood NCDs are likely to persist into adulthood. Addressing unhealthy diets as a risk factor for NCDs in children can bring substantial health gains and reduce the burden of health-care expenditure over their entire life cycle.[54]

36. In addition to marketing of unhealthy food targeted at children, including through toy giveaways, competitions, social media, cartoon characters, games, television, movies, interactive websites and in youth-oriented settings such as schools and recreation centres, parents are also often targeted by such pervasive marketing.[55] This is done to encourage parents to buy unhealthy foods for their children. In many cases, the food industry's marketing to children and their parents may be disproportionately aimed at particular racial, ethnic or socioeconomic groups, exacerbating health inequities faced by those groups.[56]

37. Children are also frequently exposed to junk foods in both public and private settings. Food served or sold in institutional settings such as schools may be disproportionately weighted towards junk foods or other foods of limited nutritional value, particularly in school lunch programmes, where funds for healthier foods may be limited.[57] Other places serving children and youth, such as sports centres, may also lack healthy food options. In the private sector, meals designed for children are often high in fat, sugar and salt, and fail to meet children's nutritional needs, especially at fast food establishments. This may be the case even for foods marketed as "healthy" children's meals. Where genuinely nutritious options are available, the default option may still be the unhealthy one.[58]

38. States are urged to implement their obligations regarding children's right to health, which requires States to address obesity in children, limit children's exposure to fast foods and drinks high in sugar and caffeine and other harmful substances, regulate the marketing of such foods and control their availability in schools and other places frequented by children. States should also ensure that effective health education and awareness programmes are targeted toward children, such as countermarketing campaigns or peer education programmes, and that healthy food options and information relating to them are available at institutions serving children, such as schools, paediatric health facilities or youth centres.

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[52] *Ibid*, p. 7.

[53] NCD Alliance, "Children in every policy: recommendations for a lifecourse approach to NCDs", briefing paper, May 2011, p. 2.

[54] "A focus on children and non-communicable diseases (NCDs)" (see footnote 54 above), p. 5.

[55] WHO Regional Office for Europe, *Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012–2013* (Copenhagen, 2013); Consumers International, *The Junk Food Trap: Marketing Unhealthy Food to Children in Asia Pacific* (London, 2008).

[56] Yale Rudd Center for Food Policy and Obesity, *Fast Food Facts 2013: Measuring Progress in the Nutritional Quality and Marketing of Fast Food to Children and Teens* (Robert Wood Johnson Foundation, Princeton, 2013), p. 63.

[57] Patricia M. Anderson and Kristin F. Butcher, "Reading, writing and raisinets: are school finances contributing to obesity?", National Bureau of Economic Research Working Paper No. 11177, (Cambridge, 2005), p. 5. Available from http://www.nber.org/papers/w11177.pdf.

[58] *Fast Food Facts 2013* (see footnote 59 above), p. 29.

B. Women

39. Unhealthy foods are commonly marketed in gendered ways, perpetuating traditional and unequal gender dynamics to the disadvantage of women. Despite the increase in dual-income or female-breadwinner households, women still bear a disproportionate share of household duties, particularly in preparing meals. This leads to the increased consumption of highly-processed convenience foods, as women have less time but are still expected to be responsible for food provision.[59] Food advertisements often target women about providing cooked meals for their children or by offering aspirational products that are "improved" over traditional diets.

40. Other marketing messages targeted at women may emphasize sexuality and unattainable "desirable" body types to promote unhealthy foods, which not only perpetuate gender stereotypes but also have a negative impact on both physical health, such as diet-related NCDs, and mental health, such as eating disorders.[60]

41. Food policies that emphasize home cooking to improve diets must take into account these gender and labour-force dynamics. Healthy eating programmes should not focus solely on mothers, but must also promote the role of men in food preparation, as well as take into account a diverse range of family arrangements.

C. Low-income groups

42. Although NCDs are often perceived as "diseases of affluence", the relationship between income and diet-related risk factors is complex.[61] Studies have suggested that after a country reaches a per-capita gross domestic product of US$ 2,560, obesity becomes more prevalent in lower-income than higher-income groups,[62] while consumption of unhealthy food is strongly associated with both lower income and lower levels of education in several developed and middle-income countries.[63] The perception that NCDs affect only the wealthy has led to the neglect of the diseases in health policies for low-income persons, to the detriment of their right to health.[64]

43. Low-income groups frequently have poorer diets than other sections of the population,[65] as healthy foods like fresh fruit and vegetables may be unaffordable for them, discouraging their consumption.[66] Many low-income groups, such as shift workers, also

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[59] Patricia Allen and Carolyn Sachs, "Women and food chains: the gendered politics of food", *International Journal of Sociology of Food and Agriculture*, vol. 15, No. 1 (2007), pp. 9–10.

[60] *Ibid.*, pp. 2–4.

[61] Food Research and Action Center, "Do the data show a link between obesity and poverty?", fall 2010, available from http://frac.org/wp-content/uploads/2010/09/do_data_show_obesity_poverty_link_brief.pdf; Carlos A. Monteiro *et al.*, "Socioeconomic status and obesity in adult populations of developing countries: a review", *Bulletin of the World Health Organization*, vol. 82, No. 12 (December 2004), pp. 940–946.

[62] "Socioeconomic status and obesity in adult populations of developing countries" (see footnote above); WHO, *A Framework to Monitor and Evaluate Implementation: a Global Strategy on Diet, Physical Activity and Health* (Geneva, 2008), para. 8.

[63] See WHO Regional Office for the Western Pacific, *Non-Communicable Disease and Poverty: the Need for Pro-Poor Strategies in the Western Pacific Region: a Review* (Geneva, 2007), pp. 29–32.

[64] *Ibid.*, pp. 8–9.

[65] Nicole Darmon and Adam Drewnowski, "Does social class predict diet quality?", *American Journal of Clinical Nutrition*, vol. 87, No. 5 (May 2008), pp 1107–1117.

[66] Mayuree Rao *et al.*, "Do healthier foods and diet patterns cost more than less healthy options? A systematic review and meta-analysis", *BMJ Open*, vol. 3, No. 12 (2013).

tend to lack the time or facilities for cooking, making ultraprocessed, ready-to-eat foods more attractive than healthy foods even if they are not necessarily less expensive.

44. Low-income persons may also be more likely to live in "food deserts", where healthy fresh food options are lacking, or in "food swamps", where there is significantly greater presence of unhealthy foods and unhealthy food marketing. Healthy foods are frequently less available, of lower quality and attractiveness, or more expensive in low-income areas.[67] Conversely, lower-income areas can have up to two and a half times as many fast food stores as higher-income areas.[68] These problems are likely to be compounded by geographical barriers for remote rural communities, poorly served urban slums or where transport between lower-income and higher-income areas is poor.

45. Poor diets tend to have greater consequences for low-income persons than for other groups. Undernutrition early in life may lead to a greater probability of obesity later in life due to a "feast or famine" response that causes the body to hoard fat when it is available.[69] This combination of lack of food security or hunger with the ready availability of calorie-dense junk foods places many low-income communities at particular risk of NCDs, compared to higher-income groups. Psychosocial factors such as stress, higher incidences of other NCD risk factors and less access to preventive care can also increase risks of diet-related diseases such as diabetes, heart disease and hypertension among low-income groups.[70]

46. In combating NCDs, States should therefore ensure that they comprehensively address socioeconomic disparities. They should ensure that food security or poverty reduction plans adequately address the need for healthier food options. They could do so, for example, by increasing availability of fruits and vegetables under food security schemes, incentivizing food retailers to stock healthy foods in low-income neighbourhoods or improving public transport to areas where healthy foods are available. In particular, social programmes aimed at ensuring food and nutritional security can be a useful tool for improving health, if they are sufficiently funded to allow for the purchase of healthy options and are combined with appropriate measures to provide nutrition education and make healthy foods available and accessible to those receiving benefits.[71] Finally, States should work to eliminate inequities in access to primary and preventive care, to lessen the disproportionate effects of unhealthy foods on low-income communities.

VII. Participation

47. The right to health framework requires the participation of the population, especially affected populations, in health-related decision-making at all levels – community, regional and national. States should ensure the participation of affected communities and vulnerable groups in developing food policy and in decision-making regarding food availability and

[67] Policy Link and The Food Trust, *The Grocery Gap: Who has Access to Healthy Food and Why it Matters* (2010).

[68] DD Reidpath *et al.*, "An ecological study of the relationship between social and environmental determinants of obesity", *Health Place*, vol. 8, No. 2 (2002), pp. 141–145.

[69] Gian-Paolo Ravelli *et al.*, "Obesity in young men after famine exposure in utero and early infancy", *New England Journal of Medicine*, vol. 295, No. 7 (1976), pp. 349–353.

[70] Food Research and Action Center, "Food insecurity and obesity: understanding the connections", spring 2011, available from http://frac.org/pdf/frac_brief_understanding_the_connections.pdf.

[71] Food Research and Action Center, "How improving federal nutrition program access and quality work together to reduce hunger and promote healthy eating", February 2010, available from http://www.frac.org/pdf/CNR01_qualityandaccess.pdf.

marketing in places such as schools, workplaces and community centres. Participation empowers people to exercise their right to autonomy and make their own decisions about their dietary health.

48. Meaningful participation has public health benefits and also empowers people in accordance with the right to health approach. States should ensure that spaces are available for children and their parents to provide input on school foods, employees to give input on food at the workplace, or by enabling community or consumer groups to be involved in standard-setting. States should seek broad public consultation to inform policies across sectors, including on agricultural production policies, the regulation of unhealthy foods, nutritional standards in public institutions and for monitoring transparency in food labelling, marketing or promotion.

49. States should encourage community health programmes on diet-related NCDs, such as peer education, community gardening and cooking initiatives, or healthy eating initiatives based at schools, workplaces, primary health-care centres or food vendors. Since addressing the risk factors of NCDs involves long-term behavioural change, ownership of health policies by local communities can ensure the success and sustainability of nutrition and preventive health programmes. The participation of local communities ensures that health policies and programmes are better targeted to their health needs. Including children's involvement and input in school lunch programmes can help identify options that are both healthy and appealing to children, and has often shown that the perception that children prefer unhealthy options is inaccurate.[72] Local participation by residents of low-income areas may help provide an assessment of foods available in those areas that is more reflective of the day-to-day experiences of residents than expert-formulated surveys would be able to establish. Likewise, educating and involving consumers and informal sector food vendors in healthy food programmes can improve nutrition in a sector that is otherwise difficult to regulate, while also allowing such vendors to maintain their livelihoods.

VIII. Accountability and remedies

50. States have an obligation to make legislative, judicial and administrative mechanisms available, accessible and effective to enable people to hold States and non-State actors accountable and claim remedies for violations of their right to health. Omission by States to legislate and enforce regulatory frameworks with respect to the food industry may in itself be a violation of the right to health. For instance, if the State fails to put into place laws requiring the provision and dissemination of information, people may not be in a position to make informed choices about their diet, which may prevent them from realizing their highest attainable standard of health.

51. States should not only ensure that relevant laws and policies are in place, but also that they are formulated, implemented and monitored in a transparent manner, in line with the right to health. Transparency should be ensured at all times, including when negotiating international obligations. Although transparency is required by some investment treaties, it is linked to the promotion and protection of international investment.[73] The thrust is towards ensuring that laws and regulations, which may affect investments, are made

[72] Katherine Bauer *et al.*, "'How can we stay healthy when you're throwing all of this in front of us?' Findings from focus groups and interviews in middle schools on environmental influences on nutrition and physical activity", *Health Education and Behavior*, vol. 31, No. 1 (February 2004), pp. 40–41.

[73] World Trade Organization, Principles of the trading system, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

publicly available to the contracting parties. Some international organizations have adopted transparency principles that pertain, however, to the predictability of investment rules and regulations[74] to protect the commercial interest of contracting parties, which benefits the private commercial interests of TNCs. Furthermore, these treaties are negotiated in secret without any discussion at the domestic level, which is not compatible with the right to health framework.[75]

52. Commercial investment treaties cast obligations that are automatically binding on States. To abide by these obligations, States may be compelled to modify national policies such as agricultural or labelling policies. As a result, the function of States to formulate domestic policy gets distorted in favour of the private rights of food and beverage industries, rather than the public rights of the affected population.[76] The right to health framework, on the other hand, requires transparency in activities that directly or indirectly affect governance. It acts as a check against arbitrary decisions that may be taken by States and pre-empts violations of the right to health. One of the ways in which States could ensure transparency is by opening negotiations to include affected people such as farmers and consumers. At minimum, States should make the content of negotiations and agreements available for public scrutiny and invite comments by stakeholders before entering into these agreements.

53. Accountability can also be ensured through indicators, benchmarks and targets against which the performance of State and non-State actors in achieving goals to reduce risk and prevalence of NCDs can be monitored and evaluated.[77] As multiple agencies of the State may be involved in regulating activities of the food industry and the provision of nutritious food,[78] information outlining their individual and joint efforts towards attaining the set benchmarks should be made public. Making information available to the public and independent monitoring bodies will enable them to assess the activities of the food industry and their compliance with domestic marketing, labelling and nutrition standards and laws. States should also encourage monitoring of other non-State actors such as private schools and broadcasting agencies to review their policy *vis-à-vis* the food industry. Review and evaluation of actions taken and standards adopted by States and non-State actors to ensure the sale and availability of nutritious foods comprise the accountability framework.

54. Due to the increased prevalence of NCDs and their link to practices adopted by the food industry, access to remedies is necessary. Judicial remedies to hold TNCs accountable for the violations of the right to health are particularly hard to achieve. Investment treaties such as bilateral investment treaties and free trade agreements, which facilitate the foray and entrenchment of TNCs into domestic economies, contain international dispute settlement mechanisms that allow private companies to sue States. However, these treaties

[74] ASEAN [Association of Southeast Asian Nations] Comprehensive Investment Agreement, Article 1 (c). Available from http://aseansummit.mfa.go.th/14/pdf/Outcome_Document/ASEAN%20Compre%20Invest%20Agreement.pdf.

[75] Sharon Friel *et al.*, "A new generation of trade policy: potential risks to diet-related health from trans Pacific partnership agreement", *Globalization and Health*, vol. 9, No. 46 (2013), p. 2.

[76] Sarah E. Clark *et al.*, "Exporting obesity: US farm and trade policy and the transformation of the Mexican consumer food environment", *International Journal of Occupational and Environmental Health*, vol. 18, No. 1 (2012), p. 54.

[77] WHO, Draft comprehensive global monitoring framework and targets for the prevention and control of noncommunicable diseases, A66/8. Available from http://apps.who.int/gb/ebwha/pdf_files/WHA66/A66_8-en.pdf.

[78] Michael R. Taylor, "Preparing America's food safety system for the twenty-first century", *Resources*, No. 127 (spring 1997), p. 16. Available from http://rff.org/Documents/Resources/Resources-127_Taylor.pdf.

impose unilateral obligations on host States, so that it becomes difficult to bring TNCs into their domestic legal system, including the judicial system. Moreover, the principles of limited liability and separate legal personalities are often relied upon by parent companies to absolve themselves of any liability of their subsidiaries operating in various jurisdictions.[79] Even where remedies against domestic companies exist, their enforcement is often absent or lax, and companies are not penalized for non-compliance. Consumers should be able to seek remedies against food companies, irrespective of the country of origin of the parent company. States should therefore clarify under domestic law the liability of the parent company and its subsidiaries.

55. Remedies for violations of the right to health should be available from States as well. In cases where States have not enshrined the right to health obligation in the domestic legal system, adjudicatory mechanisms should exist for people to claim remedies against the State and hold it accountable for failing to respect, protect and fulfil the right to health. In cases where States neglect to take steps to fulfil international commitments to reduce the burden of NCDs, including diet-related NCDs, people should have access to domestic and thereafter international mechanisms to claim remedies against States for not taking steps towards this goal. Ensuring access to a range of remedies, in the form of restitution, compensation, satisfaction or guarantees of non-repetition, is an effective way to hold State and non-State actors accountable for violations of the right to health.

IX. International assistance and cooperation

56. Under the right to health framework, States should extend their assistance and cooperation to full realization of the right to health. While entering into international agreements, States should ensure that such agreements do not negatively impact on the enjoyment of the right to health.

57. Giving primacy to international trade over the right to health has widespread repercussions on public health.[80] For instance, under international trade agreements, States have sometimes expressed concerns about requirements in other States' domestic nutrition labelling policies, which have been instituted to attain public health goals.[81] Such practices may restrict the policy space of developing countries in favour of attracting FDI and avoiding economic sanctions.[82] Bilateral investment treaties may subvert existing internationally agreed upon guidelines and lower tariff and non-tariff barriers to trade, allowing freer import and export of unhealthy food products. For instance, free trade agreements have been directly linked to an increased consumption of soft drinks.[83]

58. Investment agreements may also contain provisions that allow States to be sued for taking measures to protect public health that may adversely impact investments of the contracting party and private corporations. The mere threat of onerous and expensive

[79] Gwynne Skinner *et al.*, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR/CORE/ECCJ, 2013), p. 11. Available from http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf.

[80] Kelley Lee and Meri Koivusalo, "Trade and health: is the health community ready for action?", *PLOS Medicine*, vol. 2, No. 1 (2005), p. 14.

[81] World Trade Organization, "Members discuss guidelines for trade-friendly regulation and STOP sign for 'junk food'", 13 March 2013, available from http://www.wto.org/english/news_e/news13_e/tbt_13mar13_e.htm.

[82] WHO, *Trade, Trade Agreements and Non-Communicable Diseases in the Pacific Islands* (2013), p. 10.

[83] "Manufacturing epidemics" (see footnote 10 above), p.6.

litigation may create a chilling effect where States would refrain from formulating such policies in the first place.[84] In order to reduce the global and domestic burden of NCDs and ensure that health concerns override trade relations, States need to collaborate by supporting localized and suitable food systems and ensuring that domestic policy space on nutritional systems is protected.[85] When entering into investment agreements, host States should take assertive steps and mention clear and explicit exceptions to investments that may harm public health.[86]

59. In addition, States should extend their assistance to low- and middle-income countries, which, due to their limited resources, may be unable to attain required nutrition standards, leading to an increased burden of NCDs.[87] In such cases, States should extend their assistance through technology transfer, capacity-building and, where necessary, by providing monetary support (A/RES/66/2). This will help ensure that States lacking sufficient expertise develop and sustain the requisite technology to take preventive actions against NCDs.

60. Political commitment towards diet-related NCDs at the international level has so far been weak. NCDs have traditionally not been given importance in international policies, including the Millennium Development Goals.[88] International aid agencies providing health-related assistance to low- and middle-income countries have not sufficiently prioritized NCDs there.[89] Only recently have international and regional organizations shifted their focus and called upon Governments, the private sector and non-governmental organizations to come together to take steps towards prevention of NCDs across regions.[90] In formulating the post-2015 development agenda, States have commendably shown unprecedented political will to address the reduction and prevention of NCDs,[91] and Governments have been urged to reduce the burden of NCDs by 2025.[92] There is increasing recognition among Governments of the link between unhealthy diets and NCDs and the challenges they pose for development (A/RES/66/2).

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[84] "A new generation of trade policy" (see footnote 78 above), p. 5.

[85] Joint statement of Asia–Pacific Economic Cooperation (APEC) Ministers at the 2010 APEC Ministerial Meeting, Yokohama, 11 November 2010. Available from http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2010/2010_amm.aspx.

[86] Anne Marie Thowa and Benn McGrady, "Protecting policy space for public health nutrition in an era of international investment agreements", *Bulletin of the World Health Organization*, vol. 92 p. 142. Available from http://www.who.int/bulletin/volumes/92/2/13-120543.pdf.

[87] NCD Alliance, "Food, nutrition, diet and non-communicable diseases", available from http://www.wcrf.org/PDFs/PPA_NCD_Alliance_Nutrition.pdf.

[88] Shanthi Mendis, "The policy agenda for prevention and control of non-communicable diseases", *British Medical Bulletin*, vol. 96, No. 1 (2010), p. 37.

[89] G.F. Anderson, "Missing in action: international aid agencies in poor countries to fight chronic disease", *Health Affairs*, vol. 28, No. 1 (January–February 2009), pp. 202–203.

[90] Prevention and control of non-communicable diseases: Report of the Secretary-General (A/66/83); Pan American Health Organization, *CARMEN: an Initiative for Integration of Prevention of Noncommunicable Diseases in the Americas* (Washington D.C., 2003). Available from http://www.paho.org/carmen/wp-content/uploads/2012/06/CARMEN-General-Overview.pdf.

[91] A new global partnership: eradicate poverty and transform economies through sustainable Development: report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, p. 38. Available from http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf.

[92] WHO, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020* (Geneva, 2013), Objective 3, pp. 31–32. Available from http://apps.who.int/iris/bitstream/10665/94384/1/9789241506236_eng.pdf?ua=1.

61. An effective international framework is needed to hold the global food industry legally accountable for its actions.[93] There is a need to create an international framework that binds States and casts responsibility on them to modify their domestic laws for reduction and prevention of diet-related NCDs. The Framework Convention on Tobacco Control could be used as a foundation on which an international framework for accountability and monitoring of the food and beverage industry can be built. The international community also needs to ensure that food corporations driven by commercial interests do not undermine the efforts of States to realize the enjoyment of the highest attainable standard of health.

62. However, mere political consensus may not be sufficient to attain a reduction in diet-related NCDs. States, intergovernmental organizations and non-governmental organizations should come together to combat this epidemic. States need to have a time-bound plan outlining concrete steps to be taken individually and jointly to progressively attain a global and domestic reduction in the burden of diet-related NCDs. To operationalize this goal, States should formulate indicators, benchmarks and global and domestic accountability mechanisms. States should also allocate sufficient resources to reduce and prevent the obesity epidemic as well as the increasing burden of diet-related NCDs.

X. Conclusion and recommendations

63. **In keeping with their obligations to respect, protect and fulfil the right to health, States should formulate and implement a national public health strategy and plan of action to address diet-related NCDs, which should be widely disseminated. Such a strategy should recognize the link between unhealthy foods and NCDs, while specifically addressing the structural flaws in food production, marketing and retail that promote the availability and accessibility of unhealthy foods over healthier options. Towards this end, States should necessarily develop multisectoral approaches that include all relevant ministries such as ministries of health, agriculture, finance, industry and trade. States should also ensure meaningful and effective participation of affected communities such as farmers and vulnerable groups like children, women and low-income groups in all levels of decision-making to discourage production and consumption of unhealthy foods and promote the availability and accessibility of healthier food options.**

64. **With a view to respecting, protecting and fulfilling the right to health, the Special Rapporteur recommends that States take the following steps:**

(a) Increase availability and accessibility of healthier food alternatives through fiscal and agricultural policies that discourage production of unhealthy foods. Also take measures to incentivize farmers to grow healthier products;

(b) Make nutritious and healthy foods available and geographically and economically accessible, especially to low-income groups;

(c) Provide information about the ill effects of unhealthy foods and raise awareness of the benefits of balanced diets and healthy foods to promote consumption of healthier foods;

[93] Human Rights Watch, "UN Human Rights Council: weak stance on business standards", 16 June 2011, available from http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

(d) Adopt, implement and enforce easy-to-understand labelling and nutritional profiling requirements, such as "traffic light" labelling;

(e) Encourage TNCs, through incentives and other fiscal measures, to manufacture and sell healthier alternatives of foods and beverages that are not harmful to the people's health;

(f) Regulate the marketing, advertisement and promotion of unhealthy foods, particularly to women and children, to reduce their visibility and to increase the visibility of healthier options by, for instance, requiring supermarkets to place fruits and vegetables in more accessible and visible places.

65. With a view to ensuring their obligation to realize the right to health of vulnerable groups such as children, women and low-income groups, the Special Rapporteur recommends that States take the following steps:

(a) Address gender stereotypes in preparation of meals that place an unequal burden of cooking on women;

(b) Formulate and implement health education programmes to promote healthy food options in such institutional settings as schools, health or youth centres and workplaces by involving children, parents and employees, respectively;

(c) Ensure that social welfare schemes for low-income groups make relevant information available and provide access to healthier food options to eliminate "food deserts".

66. Recognizing the role of the food industry in the growing burden of NCDs, the Special Rapporteur recommends that the food industry take the following steps:

(a) Adopt internationally acceptable nutritional labelling guidelines and comply with domestically-enacted guidelines in this respect;

(b) Refrain from marketing, promoting and advertising of unhealthy foods to the population, especially to children;

(c) Invest in improving the nutritional content of unhealthy foods;

(d) Increase transparency of nutritional information on food products, while desisting from making false and misleading health claims;

(e) Abstain from undermining public health nutrition efforts, including through such means as funding and publicizing biased research, instituting front groups and conducting expensive and onerous litigation.

67. With a view to making accountability and remedial mechanisms available and accessible to victims of violations, the Special Rapporteur recommends that States take the following steps:

(a) Ensure that international investment and trade agreements are entered into with full transparency and participation of affected groups by conducting open discussions before, during and after negotiation of the agreements;

(b) Encourage and promote independent monitoring of activities of the State and the food industry. Urge participation of affected people and local communities in monitoring such activities;

(c) Ensure remedies through legislation and appropriate mechanisms against States and non-State actors for failure to take steps towards their obligations under the right to health and to fulfil their international commitments on reduction of diet-related NCDs.

68. **With regard to the international obligations of States, the Special Rapporteur recommends that States take the following steps:**

(a) Accord primacy to the right to health in international investment and trade agreements, and ensure that the right to health is not impaired by the provisions of these agreements or their implementation;

(b) Extend assistance and cooperation to other States, which, due to limited resources available to them, may be unable to attain required nutrition standards, leading to an increased burden of diet-related NCDs;

(c) Formulate goals and take concrete steps, jointly and individually, to reduce the burden of diet-related NCDs in a manner that also takes into account available resources of each State.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul

Summary

In the present report, the Special Rapporteur on the independence of judges and lawyers clarifies the notion of judicial accountability and highlights its importance in the light of the fundamental principle of judicial independence. The main goal of the report is to demonstrate that judicial accountability and judicial independence are two essential elements of an independent, impartial and efficient justice system, and that, as a consequence, States should undertake efforts to develop and adopt international standards for judicial accountability to guide the enactment of domestic legislation establishing a comprehensive system of judicial accountability which is effective, objective, transparent and respects judicial independence.

Following a brief outline of the activities carried out by the Special Rapporteur in 2013 and 2014, the thematic section of the report first considers concepts and definitions of judicial accountability, highlighting its importance for upholding the rule of law and strengthening the independence of the judiciary. The report then examines existing international human rights standards relating to judicial accountability. It continues with an analysis of the different forms of judicial accountability and the mechanisms and proceedings for its implementation. The report then addresses the issue of State responsibility and the right to a remedy for people whose human rights have been violated as the result of a wrongful conviction or miscarriage of justice. The final two sections contain the Special Rapporteur's conclusions and a number of recommendations aimed at assisting States in adopting and implementing appropriate and effective judicial accountability mechanisms, in line with the principle of the independence of the judiciary, which will contribute to improving the administration of justice and upholding the rule of law.

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I. Introduction

1. The present report is submitted in accordance with resolution 17/2 of the Human Rights Council.

2. Following a brief outline of the activities of the Special Rapporteur in 2013 and early 2014, the thematic section of the report concentrates on judicial accountability. The report starts by discussing the notion and definitions of accountability and judicial accountability. It then highlights existing international and regional human rights standards relating to judicial accountability and proceeds to analyse the connection between judicial accountability and judicial independence. The report examines different forms of judicial accountability and the various mechanisms that can be implemented to ensure that the justice system is duly held to account while respecting its independence. Lastly, the report addresses the responsibility of the State for miscarriages of justice and the implementation of the right to a remedy in the context of judicial accountability.

3. The Special Rapporteur observes that, as the enforcement of human rights ultimately depends upon the proper administration of justice, an independent, competent and impartial justice system is paramount if it is to uphold the rule of law. The independence of the judiciary is not, however, an absolute concept and it should not be used with the sole purpose of granting personal benefits and limitless powers to judges, prosecutors and lawyers (hereafter "justice operators"). Indeed, while justice operators must enjoy some privileges and immunities because of their functions and in order to ensure their independence and impartiality, they must also be accountable for their actions and conduct so that the guarantees of their independence are not abused.

4. The Special Rapporteur aims to demonstrate that when proper mechanisms are in place, judicial accountability should and will contribute both to increasing public trust in the justice system and to reinforcing judicial independence. In particular, she examines the grounds on which and the processes through which each justice operator can be held accountable. Her analysis, conclusions and recommendations are based on an overview of international and regional human rights standards, principles and jurisprudence.

II. Activities in 2013 and 2014

A. Country visits and communications with Member States

5. The Special Rapporteur carried out official visits to the Russian Federation, from 15 to 25 April 2013 (A/HRC/26/32/Add.1), the State of Qatar, from 19 to 26 January 2014, and the United Arab Emirates, from 28 January to 5 February 2014, at the invitation of the respective Governments. She will present her reports on the visits to Qatar and the United Arab Emirates at the twenty-ninth session of the Human Rights Council, to be held in 2015.

6. Since she last reported to the Human Rights Council, the Special Rapporteur has sent requests for official visits to the Governments of Argentina, China, Egypt, Fiji, France, Germany, Greece, the Holy See, India, Iraq, Italy, Kenya, Nepal, the Philippines, Portugal, Spain, Tunisia, the United States of America and the Bolivarian Republic of Venezuela. She would like to thank the Government of Morocco for inviting her to visit the country. She encourages those Governments who have yet to respond to her requests to consider extending an invitation to visit in the near future.

7. From 2 March 2013 to 1 March 2014, the Special Rapporteur sent a total of 84 communications alleging violations of human rights in the context of her mandate to

42 Member States and other entities. Of the communications sent, 60 were urgent appeals and the remaining 24 were letters of allegation. Details of the communications and responses from Governments are included in the communications reports of special procedures (A/HRC/24/21; A/HRC/25/74; and A/HRC/26/21).

B. Other activities

8. On 28 February and 1 March 2013, the Special Rapporteur attended the global thematic consultation on governance and the post-2015 development agenda organized by the United Nations Development Programme in Johannesburg, South Africa.

9. From 5 to 9 May 2013, she participated in the sixty-second session of the General Assembly of the Latin American Federation of Judges and the annual meeting of the Iberoamerican Group of the International Association of Judges, held in Santiago, Chile.

10. On 28 May 2013, during the twenty-third session of the Human Rights Council, the Special Rapporteur presented her annual thematic report which focused on legal aid (A/HRC/23/43 and Corr.1). She also presented reports on her official visits to El Salvador (A/HRC/23/43/Add.1), Maldives (A/HRC/23/43/Add.3) and Pakistan (A/HRC/23/43/Add.2), and on the subregional consultation on the independence of the judiciary in Central America (A/HRC/23/43/Add.4). On 29 May, she participated as a panellist in a side event on the independence of the judiciary in the Russian Federation.

11. From 24 to 28 June 2013, the Special Rapporteur participated in the twentieth annual meeting of special procedures mandate holders and the Vienna Declaration and Programme of Action +20 conference, held in Vienna.

12. On 12 July 2013, she was invited to participate in consultations with the Executive Secretariat and Special Rapporteurs of the Inter-American Commission on Human Rights in Washington D.C.

13. From 5 to 6 August 2013, the Special Rapporteur participated in a conference in Lima on judicial independence and dignity, organized by the National Association of Magistrates of Peru, at which she presented a statement about judicial independence.

14. On 12 and 13 September 2013, she participated in various activities in Asunción concerning human rights indicators on the right to a fair trial, organized by the Supreme Court of Justice of Paraguay, during which she presented a statement welcoming the indicators.

15. From 5 to 10 October 2013, she participated in the fifty-sixth annual meeting of the International Association of Judges in Yalta, Ukraine.

16. On 28 October 2013, the Special Rapporteur presented her annual report to the General Assembly (A/68/285), which focused on military tribunals. On the following day, she participated in a round table entitled "Accountable Governance, Peace and Stability in Africa: What Role for the United Nations Human Rights Special Procedures?" organized by the International Peace Institute.

17. On 25 March 2014, she participated through videoconference in the public discussion on "Enforced Disappearances and Military Justice" organized by the Committee on Enforced Disappearances, and presented the findings of her 2013 report to the General Assembly.

III. Judicial accountability

A. Introduction, concepts and definitions

18. Accountability is generally defined as an obligation or willingness to accept responsibility or to account for one's actions.[1] That means that the professionals or institutions being held accountable accept responsibility for acting or functioning in ways that are consistent with accepted standards of behaviour and conduct, and face sanctions for failures to do so.

19. In that regard, accountability is a concept inherent to the rule of law, which is at the heart of the principles promoted by the United Nations. The rule of law, as defined in the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, requires that accountability mechanisms and procedures be clearly established by law to enhance the transparency, fairness, integrity and predictability of public and private institutions and entities (S/2004/616, para. 6).

20. During her mandate, the Special Rapporteur has observed that the issue of judicial accountability has received renewed attention, especially in the context of democratic and/or judicial reforms. Governments, institutions, human rights defenders, civil society and international organizations have been increasingly calling for concrete action to address the issue of judicial accountability.

21. In many countries, there is dissatisfaction with the way the judiciary is performing the tasks with which it has been entrusted. That may be the result of a variety of factors, including the perception that the judicial system is not operating efficiently, that it is not responding to societies' needs, or that there is widespread corruption in the judiciary.

22. The Special Rapporteur has also noted with concern that, under certain circumstances, failures to improve accountability or to address the issue of judicial corruption or misconduct are often used as a pretext for launching large-scale attacks on the independence of the judiciary.

23. Yet, both independence and accountability are essential elements of an efficient judiciary. They must therefore operate in conjunction with each other. The central question is then how to approach demands for more judicial accountability while safeguarding the fundamental principle of judicial independence. Calls for accountability can often be mistakenly interpreted as a threat to judicial independence, but in democratic systems the approach has to be less absolute and more nuanced and leave room for the development of accountability mechanisms for the justice system. The requirement of independence and impartiality does not exist for the benefit of the judges and prosecutors themselves, but rather for court users as a part of their inalienable right to a fair trial. Thus, if guarantees of independence and impartiality are privileges granted to judges and prosecutors in order to benefit the public, it is logical that mechanisms should be put in place to verify that those privileges are used properly and that their purpose is not perverted.

24. For the purposes of the present report, the term "judicial accountability" will be used to refer to the accountability of the three main operators in the justice system: judges, prosecutors and lawyers.

[1] Merriam-Webster dictionary online. Available from www.merriam-webster.com/dictionary/accountability.

B. Legal framework

25. At the international level, the focus until now has been primarily on defining and developing safeguards that States have to put in place to ensure the independence of their judiciaries. Specific and detailed references to judicial accountability have yet to appear in international human rights instruments.

26. Indirect reference to judicial accountability is, however, found in many binding and non-binding international instruments where terms such as "liability", "accountability" and "responsibility" are used interchangeably in connection with the notion of the proper exercise of the functions of justice operators, who must act with decorum and in accordance with their codes of ethics or conduct.

27. The United Nations Convention against Corruption refers to the promotion of "integrity, accountability and proper management of public affairs and public property" as one of it purposes (art. 1, para. c). It further states that "in order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system" (art. 8, para. 1), and that "each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions" (art. 8, para. 2).

28. In turn, the Basic Principles on the Independence of the Judiciary establish that "judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary" (principle 8). Principle 18 further states that judges should be suspended or removed only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

29. The Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex) were developed in order to establish an international standard for the ethical conduct of judges, to provide guidance on universal judicial ethics and to strengthen judicial integrity. As such, they represent an important attempt to fill the gap in the international legal framework regarding judicial accountability.

30. The preamble to the Bangalore Principles explicitly states that the Principles "presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge". The Bangalore Principles further provide that judges should devote their professional activity to judicial duties and that their conduct should not be incompatible with those duties (value 6).

31. The Universal Charter of the Judge, approved by the International Association of Judges, makes clear reference to the civil and criminal responsibility of judges. In particular, it states that civil action, in countries where it is permissible, and criminal action against a judge, including arrest, must only be allowed under circumstances ensuring that his or her independence cannot be influenced (art. 10).

32. Regarding prosecution services, the Guidelines on the Role of Prosecutors indicate that States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability (guideline 4).

33. The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors in 1999, state that prosecutors shall at all times maintain the honour and dignity of their profession, always conduct themselves professionally, in accordance with the law and the rules and

ethics of their profession, and at all times exercise the highest standards of integrity and care (standard 1).

34. The Basic Principles on the Role of Lawyers stipulate that "lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession" (principle 23) and that "all disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles" (principle 29). Furthermore, the International Bar Association adopted an International Code of Ethics in 1956 and revised it in 1988, providing guidelines to lawyers in the exercise of their profession.

35. At the regional level, the Council of Europe drew up the European Charter on the statute for judges, which includes specific provisions on liability and addresses aspects directly related to judicial accountability. In fact, in the Charter liability can be interpreted as a synonym of accountability, most specifically in paragraph 5.1, which states that "the dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority ... in which the judge proceeded against must be entitled to representation".

36. In the explanatory memorandum to the Charter, the Council of Europe underscored that the Charter does not necessarily refer to the wrongful or unlawful nature of the conduct or of the exercise of functions, but rather emphasizes the damage sustained as a result of that "wrongful" or "unlawful" nature. The interpretation of liability, as prescribed in the Charter, should therefore be based on the nature of the damage that results from the wrongful conduct, as opposed to the judge's misconduct itself. That interpretation reflects the primary concern that judicial independence not be hampered by civil, criminal and administrative liability systems.

37. In addition, recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe lists a series of duties and responsibilities of judges, including their liability for judicial and non-judicial functions. Furthermore, the Magna Carta of Judges, established by the Consultative Council of European Judges, also emphasizes that "deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training" (para. 18). It further provides that "in each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure" (para. 19) and that "judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions" (para. 20).

38. The Commonwealth (Latimer House) Principles on the Three Branches of Government, adopted by Heads of Government in Abuja in 2003, explicitly use the term "judicial accountability". They highlight the fact that accountability and independence jointly strengthen public trust in the judiciary and that proper procedures for the removal of judges for reasons of incapacity or misbehaviour, as well as any disciplinary procedures, should be fairly and objectively administered in order to ensure that judicial accountability does not impair judicial independence.

39. Focusing on judicial practice, the Commonwealth Principles clearly link judicial ethics, which should respect and be guided by codes of ethics and conduct, and judicial accountability. The Principles underline that, as a vital element of democracy, an independent judiciary must be built on public trust. It is therefore crucial that accountability, professional ethics and conduct be respected in the exercise of judicial

functions. As a result, transparency in the judiciary must be guaranteed so as to avoid corrupt practices that undermine judicial independence and public confidence in the justice system.

40. The Statute of the Iberoamerican Judge, in its article 14, establishes that judges can be suspended or removed from office for reasons of physical or mental incapacity, negative assessment of their professional performance in the cases where the law so provides, or criminal or disciplinary responsibility, by the bodies legally established through procedures that guarantee the respect of due process.

41. The Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America, adopted by the General Assembly of the Latin American Federation of Judges in 2008, states that, as a general rule, judges are not personally civilly liable for their decisions, with the exception of cases of fraud or intentional misconduct. Moreover, in cases of repeated omission or excessive and unjustified delay attributable to judges, they should be liable for negligence, but through disciplinary action only; additionally, judges' civil responsibility can be sought only after all possibilities of procedural and appellate claims have been exhausted and only by the civilly aggrieved party. The Declaration further stipulates that both civil action, when admissible, and criminal action directed against judges, including arrest, should be exercised under conditions that cannot aim to influence the judges' judicial activity (para. 11). The Declaration also makes reference to activities which are incompatible with judicial functions, such as judges joining political parties, performing political party activities, or exercising a political activity or holding political office (para. 7 b (6)).

42. The Convention on the Prevention and Combating of Corruption, adopted by the African Union in 2003, enumerates among its objectives the establishment of the necessary conditions to foster transparency and accountability in the management of public affairs (art. 2, para. 5). It also provides that States parties undertake to create an enabling environment that will allow civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs (art. 12).

43. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also make reference to the liability of judicial officers, stating that they shall not be "liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions" or "removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body" (A 4 (n)).

44. The Beijing Statement of Principles on the Independence of the Judiciary, adopted in 1995 by the Sixth Conference of Chief Justices of Asia and the Pacific, makes an indirect reference to accountability mechanisms for judges. It states that "judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge" (para. 22).

45. In addition to those international and regional instruments, the human rights treaty bodies and regional human rights mechanisms have developed significant jurisprudence addressing the importance of judicial accountability for the effective realization of human rights, which will be discussed later in the report.

46. Nevertheless, the lack of an international instrument that directly and specifically addresses the issue of judicial accountability reveals a serious gap. Filling that gap could be critical to defining and implementing the principle of judicial accountability in line with the principle of judicial independence and other relevant international human rights standards.

C. Forms of judicial accountability

47. The notion of accountability is intrinsic to the rule of law and is often used in international and regional instruments to encompass the concepts of responsiveness, responsibility, liability, controllability and transparency in the justice system. Owing to its comprehensiveness, the term "accountability" is used generically in the title of any mechanism that aims to make institutions responsive to their respective public. In its practical sense, accountability is, in essence, a mechanism to secure the control of public power.

48. Based on that understanding, the implementation of judicial accountability mechanisms implies that certain parties can and should exercise power of supervision and control over others. Thus, in order to prevent abuses of power and improper influence by the supervising parties, a clear set of standards must be established so that justice operators and institutions are not held to account in an arbitrary way. Accountability presupposes the recognition of the legitimacy of established standards, clear mechanisms and procedures established by law, and clear rules on the authority of the supervising parties.

49. In order for judicial accountability mechanisms to be put into practice, the relationship between the justice operator to be held accountable and the forum, body or institution to which he or she must respond also needs to be clearly defined. The justice operator to be held accountable must have the means to properly explain and justify any conduct or action deemed inadequate, inappropriate or illegal through due process. The forum, body or institution exercising judicial accountability must be entitled to pose questions and assess whether the justice operator should face sanctions or not. There is therefore a close connection between accountability, which involves the possibility of imposing sanctions, and the concept of answerability, which entails non-committal provision of information.

50. In that regard, it is paramount that States undertake efforts to enact specific legislation establishing a comprehensive system of judicial accountability that is effective, objective and transparent with a view to strengthening the rule of law and improving the administration of justice.

51. While the Special Rapporteur supports the view that judicial independence and accountability are two complementary dimensions of an effective justice system, she also observes that tensions exist between the two principles. The tensions result mainly from the lack of an established, but widely needed, concept of judicial accountability. Indeed, in general, priority has been given to developing and strengthening the independence of the judiciary to the detriment of the establishment and proper functioning of accountability mechanisms, as it was thought that reinforcing independence would have more direct influence on ensuring the protection of human rights and the rule of law.[2]

52. Against that background, it is important to balance the concepts of judicial immunity, one of the guarantees of judicial independence, and accountability. Judicial immunity aims at protecting justice operators from the harassment of personal litigation against them in respect of their judicial functions, allowing them to be sued or prosecuted only with the authorization of an appropriate judicial authority. While it is important that justice operators be granted some degree of criminal immunity in relation to the exercise of their professional functions in order to protect them from unwarranted prosecution, immunity should never be applied to cases of serious crime, including accusations of corruption. Judicial immunity needs to be limited and serve its purpose of protecting the

[2] Transparency International, *Global Corruption Report 2007: Corruption and Judicial Systems*, p. 41.

independence of justice operators; total immunity would only nourish distrust among the public towards the justice system as a whole.

53. The Special Rapporteur encourages States to establish specific norms related to judicial immunity in order to avoid abuses. She further recommends that States develop international guidelines on the scope and application of judicial immunity, as it varies from country to country, which sometimes results in impunity.

54. In order to ensure a proper balance between independence and accountability, justice operators should act in accordance with predefined ethical standards and the duties and responsibilities intrinsic to their functions. In addition, in order for judicial accountability to be adequately implemented, accountability mechanisms must themselves function with independence so as to prevent external interferences that may impair the transparency, objectivity and impartiality of the processes.

55. When it comes to establishing judicial accountability mechanisms, it is important to define the concept of judicial accountability and clearly establish the actions for which justice operators should be accountable, to whom they should be accountable and through which processes. Generally, the judiciary, like other public institutions, must be accountable to the public it serves; that can be defined as an external form of accountability. The exercise of external accountability can, nevertheless, raise serious concerns regarding the misuse of accountability mechanisms to hinder judicial independence. The Special Rapporteur therefore believes that external judicial accountability should take the form of: public hearings and the publication of court decisions, allowing public scrutiny of and comment on the work of judges through the media, civil society and other commentators; an annual report to parliament, allowing parliament to take informed initiatives to reverse the effect of a judicial decision by introducing new legislation; and information on the judiciary made available on the judiciary's website. Codes of conduct and ethics, clear disciplinary proceedings established by law, and independent bodies for the self-government of the judiciary, the public prosecutor's office and the legal profession also provide a form of accountability to the public by ensuring the effective implementation of individual accountability mechanisms.

56. The Special Rapporteur is also of the view that, if independence can be interpreted from both an individual and an institutional perspective, so can accountability. Indeed, judicial accountability should not be interpreted exclusively in relation to the conduct of the individual justice operator; rather, it should be further analysed from an institutional perspective.

1. Individual accountability

57. Individual accountability is directly related to the responsibility incumbent on justice operators to uphold high standards of conduct. Accountability mechanisms specific to judges include, but are not limited to, the requirements to write reasoned individual judgments in a language that is understandable to the beneficiaries of justice, explain personal views on the law and the constitution to the general public, and comply with a registration system of pecuniary and other interests.

58. Individual accountability should also encompass extrajudicial conduct, other permitted professional activities and the private lives of justice operators. While those individuals also enjoy fundamental rights and freedoms and are free to engage in non-judicial activities, certain activities such as membership of a political party or public engagement in political activities may jeopardize the impartiality and independence of their

professional functions.[3] In some instances, national jurisprudence has considered that political activities are incompatible with judges' duties;[4] such incompatibility is included in the codes of conduct of some States. The Special Rapporteur strongly believes that justice operators should refrain from taking part in any activity which could compromise the dignity of their office or cause conflicts of interest that could hamper public confidence in the justice system.[5]

Judges

59. The principle of the independence of the judiciary is not aimed at benefitting judges themselves, but at protecting individuals from abuses of power and ensuring that court users are given a fair and impartial hearing. As a consequence, judges cannot act arbitrarily by deciding cases according to their own personal preferences. Their duty is the fair and impartial application of the law. Judges must therefore be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.

60. Clear rules of conduct and ethics must be established for judges so that they can behave according to standards that are appropriate to their judicial functions. The Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct provide useful guidelines for appropriate and adequate judicial behaviour and indicate conduct and activities that should be avoided by judges if they are to preserve their propriety as an essential element of their activities (Bangalore Principles, value 4). Judges, however, should also be provided with some privileges that can guarantee their independence and impartiality, such as personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions, which aim to prevent sanctions in relation to the content of decisions (Basic Principles, principle 16).

61. In its jurisprudence, the Human Rights Committee has expressed concern about a judicial reform that would enable the removal of judges as a result of the performance of their duties (CCPR/CO/71/VEN, para. 13). The Committee has also stated that appointing judges for a limited term of five years and the possibility, provided by law, of subjecting judges to disciplinary measures because of "incompetent rulings" (CCPR/CO/71/UZB, para. 14) or "errors in judicial decisions" (CCPR/CO/75/VNM, para. 10) expose them to pressure and endanger their independence and impartiality. In addition, the Committee has expressed concern in cases in which judges are subject to criminal liability for handing down unjust judgements, recommending that States parties ensure that judges may not be removed from their posts unless they are found guilty of inappropriate conduct by an independent tribunal (CCPR/CO/75/VNM, para.10). According to the Committee, "judges should be removed only in accordance with an objective, independent procedure prescribed by law" (CCPR/CO/75/MDA, para. 12).

62. In turn, the African Commission on Human and Peoples' Rights considered that a State violated principles 18 and 19 of the Basic Principles on the Independence of the Judiciary by failing to give any legal reasons to justify the retention of the punishment

[3] Opinion No. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, paras. 27–28.

[4] See, for instance, *Caso sobre la inconstitucionalidad del Presidente de la Corte Suprema de Justicia*, Supreme Court of El Salvador, 14 October 2013.

[5] Opinion No. 3 of CCJE, para. 39.

meted out to two magistrates.[6] The two were among a number of magistrates who had been suspended, dismissed or forced to retire. Some magistrates affected by that measure were subsequently reinstated by virtue of an amnesty, while many others, including the two magistrates mentioned above, were not.

63. The Special Rapporteur believes that individual accountability should be applied to all judges, including magistrates of the highest courts. In a 2013 mission report, she recommended that supreme court magistrates be removed from office only for specific causes previously established by law. Legislation should explicitly indicate the grounds on which magistrates can be dismissed (A/HRC/23/43/Add.1, para. 74).

Prosecutors

64. Prosecutors play a crucial role in the administration of justice and must, therefore, be able to "perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability".[7] Prosecutors are also essential for upholding the rule of law and ensuring that the law applies equally to everyone, as they have a duty to "give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law".[8]

65. In a previous report, the Special Rapporteur emphasized that the autonomy of prosecutors should not exist to the detriment of accountability (A/HRC/20/19, para. 82). Prosecutors can be held accountable through the submission of public reports by the Prosecutor General, the implementation of public audits for financial or organizational issues, the submission of prosecutorial activities to judicial scrutiny, the establishment of a prosecutorial council or similar independent body, monitoring by the executive or parliamentary accountability (para. 84).

Lawyers

66. Lawyers are also indispensable for the protection and promotion of human rights and for guaranteeing fair trial and due process. While lawyers are not expected to be impartial in the same way as judges, they must be as free as judges from external pressure and interference. When guarantees are not in place to enable lawyers to discharge their duties in an independent manner, the door is open to all sorts of pressure and interference aimed at influencing or controlling judicial proceedings (A/HRC/23/43/Add.3, para. 86).

67. Nevertheless, lawyers must be accountable with regard to their professional functions. They must conduct themselves according to ethical standards and clearly established norms of behaviour.[9] The Basic Principles on the Role of Lawyers state that "lawyers shall at all times maintain the honour and dignity of their profession" (principle 12) and that "lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession" (principle 13). Those provisions, however, must be interpreted without prejudice to the application of administrative, criminal or civil liability in cases of violations of established standards of conduct and ethics.

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[6] African Commission on Human and Peoples' Rights, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, communication No. 204/97 (2001).

[7] Guidelines on the Role of Prosecutors, guideline 4.

[8] Idem, guideline 15.

[9] International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No.1*, 2nd ed. (Geneva, 2007), p. 68.

68. The Special Rapporteur has expressed concern at cases in which lawyers have been sanctioned because of political activities, advocacy work, confusion between the lawyer's cause and his/her client's cause, and involvement in the legal representation of clients in sensitive cases. In that context, she has urged States to refrain from criminally convicting or disbarring lawyers for the purposes of silencing them, preventing them from criticizing public policies or obstructing them in their legal representation of specific clients.

2. Institutional accountability

69. State institutions should be as accountable as they are independent in order to play the role of respecting the rule of law. Institutional judicial accountability must, therefore, embrace the entire institutional organization of the justice system in a way that enables it to be monitored and held to account without being subject to improper influence, pressure or threats from the other branches of the State.

70. It is important to highlight that both the judiciary and the public prosecutor's office are State institutions. Therefore, their actions or omissions directly engage the responsibility of the State. The accountability of the institutions of the justice system involves internal and external aspects.

71. Internal institutional accountability exists to allow an internal body within the judiciary and the public prosecutor's office to monitor the independence, competence, objectivity and impartiality of their respective operators through permanent monitoring proceedings aimed at controlling their proper functioning. Those monitoring proceedings can also be initiated by complaint. The Special Rapporteur has observed several challenges to the effective implementation of internal accountability mechanisms, including corporatism and the use of accountability proceedings as an instrument of reprisal or internal pressure.

72. In order to avoid the improper use of accountability mechanisms, it is crucial that the following elements are in place: clear grounds for a removal, suspension or sanction; an independent, internal body in charge of disciplinary proceedings; and the right to have disciplinary decisions reviewed by a higher judicial tribunal. In that context, the adoption of a code of ethics and conduct is essential to contribute to the establishment and regulation of accountability proceedings and mechanisms.

73. External institutional accountability, in turn, should encompass activities whereby the public, through the media, civil society, human rights commissions and parliament, can scrutinize the functioning of the judiciary and prosecution services. Such activities can include: institutional dialogues with parliament and other State institutions, such as human rights commissions; all hearings being public; the availability and transparency of information about courts and the judiciary; and the creation of a judiciary website and the use of social media and television programmes to explain important judicial decisions and laws. A system of justice that is independent should not retreat behind closed doors.

74. The institutional accountability of lawyers' activities depends, in practice, on how the legal profession is regulated and controlled and by which body. The Special Rapporteur has observed that, depending on the country, that role is exercised by the executive, the judiciary, independent bar associations, or bodies whose members come from the different branches of the State and the legal profession.

75. The Special Rapporteur wishes to emphasize that the accountability mechanisms put in place for the legal profession should be independent from all branches of the State, including the judiciary. The Special Rapporteur has always strongly recommended the establishment of independent bar associations to deal with all matters pertaining to the legal profession, including disciplinary proceedings. Disciplinary proceedings against lawyers

should also follow procedures established by law and respect due process and fair trial guarantees.

76. Thus, in general terms, when institutional accountability fails, the responsibility of the State and the possible recognition of the right to effective remedy might be triggered. As highlighted in the Magna Carta of Judges, "the remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the State" (para. 21).

D. Judicial accountability mechanisms and proceedings

77. Accountability mechanisms and proceedings are justified because justice operators must behave with integrity and in line with their code of ethics and conduct. Indeed, international principles state that violations of established standards of judicial conduct or ethics may trigger disciplinary, civil or criminal liability.

78. In that context, regardless of the institutional structure implemented by States, accountability mechanisms and proceedings should respect general principles. To avoid being used as a means to interfere with the independence of the judiciary and the legal profession, accountability mechanisms should follow clear procedures and objective criteria provided for by law and established standards of professional conduct. More specifically, national legislation should clearly distinguish between disciplinary, civil and criminal liability and prescribe the types of sanctions to be applied. Disciplinary liability ensues when an administrative rule or regulation connected to the code of conduct or ethics is violated. Civil liability relates to the possibility of demanding that a justice operator who has caused injury by a particular course action or improper conduct repair the personal, property or financial damage he or she has caused. Criminal liability arises when a justice operator commits an illicit action or omission of a criminal nature. In that case, the individual should be submitted to a criminal investigation and possibly to prosecution, conviction and punishment.

79. All complaints made against justice operators should be processed expeditiously and fairly and the determination as to whether particular behaviour or conduct constitutes a cause for sanction must be carried out by an independent and impartial body pursuant to fair proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights and articles 10 and 11 of the Universal Declaration of Human Rights. That includes the principle of the presumption of innocence, the right to be tried without undue delay, and the right to defend oneself in person or with legal counsel of one's own choosing. In addition, in the case of judges, the investigation and proceedings against them should be kept confidential as, even if found innocent, the damage to their reputation could prove irreversible.

80. International and regional jurisprudence has confirmed how important it is that any accountability mechanism and proceedings respect the aforementioned general principles of a fair trial. For instance, in *Cedeño v. Bolivarian Republic of Venezuela* (communication No. 1940/2010), the Human Rights Committee recalled that States should establish clear procedures and objective criteria for the suspension and dismissal of the members of the judiciary and for disciplinary sanctions against them.

81. In *Harabin v. Slovakia*, the European Court of Human Rights underlined that the existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, was a relevant factor for the internal organization of the State. The Court emphasized that the mission of the judiciary in a democratic State was to guarantee the very existence of the rule of law. It therefore interpreted it as a matter of major

importance when a Government initiated disciplinary proceedings against a judge in his or her capacity as President of the Supreme Court.[10]

82. In *Chocrón Chocrón v. Venezuela*, the Inter-American Court of Human Rights sustained that any disciplinary removal procedure could only be admissible in the context of a disciplinary procedure or a duly-founded administrative decision. The Court highlighted that the obligation to found decisions is a guarantee related to the correct administration of justice, which protects the right of the people to be tried for the reasons established by law and grants credibility to judicial decisions in a democratic society.[11]

83. In *Oleksandr Volkov v. Ukraine*, the European Court of Human Rights established that the applicant, a former judge, had been dismissed in violation of the fundamental principles of procedural fairness enshrined in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, such as the principles of an independent and impartial tribunal and legal certainty, and the right to be heard by a tribunal established by law. The Court noted that the violations found in the case suggested that the system of judicial discipline did not ensure sufficient separation of the judiciary from other branches of State power and did not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence.[12] In *Olujić v. Croatia*, the Court ruled that, in order to establish whether a body can be considered independent, regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressure and to the question of whether the body presents an appearance of independence. The Court concluded by emphasizing that independence and impartiality are essential in disciplinary proceedings.[13]

84. In order to safeguard the independence of justice operators, accountability mechanisms and proceedings must therefore have a restricted application. In relation to judges, international standards state that disciplinary measures and sanctions against them can be triggered only for reasons of incapacity or behaviour that render them unfit to discharge their duties and in cases provided for by the law.[14] As a result, judges should not be removed or punished for bona fide errors or for disagreeing with a particular interpretation of the law.[15] Judges and prosecutors can be justifiably disciplined, suspended or removed from office for persistent failure to perform their duties, habitual intemperance, wilful misconduct in office, conduct which brings judicial office into disrepute or substantial violation of judicial ethics. In particular, justice operators must be duly held to account when engaged in corrupt practices. Indeed, judicial independence and immunity do not mean impunity and irresponsibility.

85. The Human Rights Committee has confirmed that position by expressing concern at cases of widespread corruption in the justice system. It has recommended that States parties take measures to eradicate corruption by investigating, prosecuting and punishing alleged perpetrators, including judges who may be complicit.[16] It has further stated that if

[10] Application No. 58688/11, final judgment of 20 February 2013, paras. 132–133.
[11] Judgment of 1 July 2011, paras. 117–118.
[12] Application No. 21722/11, judgment of 9 January 2013, paras. 199 and 205.
[13] Application No. 22330/05, judgment 5 May 2009, para. 38.
[14] Basic Principles on the Independence of the Judiciary, principle 18.
[15] International Commission of Jurists, 2007, p. 55.
[16] See, for example, CCPR/C/TKM/CO/1, para. 13; CCPR/C/CPV/CO/1, para. 15; CCPR/C/PRY/CO/3, para. 23.

corruption is established, the officials concerned should face criminal, not only disciplinary, sanctions.[17]

86. Regarding the legal profession, international standards indicate that disciplinary proceedings should be based on codes of professional conduct.[18] In that regard, lawyers should be subject to disciplinary, civil and criminal sanctions concerning their professional duties and responsibilities as agents of the administration of justice.

87. The Special Rapporteur supports the view that justice operators should be held accountable for instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute.[19] However, in order to ensure the independent exercise of their functions, they should not be subject to disciplinary proceedings or sanctions relating to the content of their rulings, verdicts, or judicial opinions, judicial mistakes or criticism of the courts.[20] The Special Rapporteur also emphasizes the importance of a code of ethics or conduct, which should be established with the participation of associations and representatives of justice operator and should be applied in a consistent and transparent manner, with full respect for the fundamental guarantees of a fair trial and due process. Furthermore, training on the duties and responsibilities of each justice operator should be made available to all of them. Education is an important instrument to strengthen accountability by raising awareness of codes of ethics and conduct, rules of procedure and the possible consequences of breaches of those norms. With proper training and education, justice operators can more easily acknowledge the importance of acting with dignity and integrity and are appropriately guided to behave in accordance with the duties and responsibilities of their functions.

Institutions and bodies in charge of overseeing the accountability of the justice system

88. The independence of justice operators and of the judiciary itself exists in order to guarantee equality and fairness to court users. For that reason, the accountability of the justice system's operators must be ensured by the State and specific and clear accountability mechanisms and proceedings must be established to deal with formal complaints or even public criticism of justice operators' actions and conduct. Such instruments should also enable judges, prosecutors and lawyers to explain their actions. The proceedings should be transparent, impartial, fair, objective, and should not undermine the credibility of the justice system as a whole; justice operators should not fear arbitrary removal from office or sanctions.

89. Precisely because the judiciary exists to answer to public interest, it must be subject to public scrutiny. It is imperative that the beneficiaries of the justice system can assess whether judges, prosecutors and lawyers are duly exercising their functions and responsibilities and whether the system itself is functioning independently and impartially. In that context, civil society has an invaluable role to play. By monitoring the proper functioning of the justice system, it encourages engagement through a substantive and transparent dialogue between justice operators, the other powers of the State and the general public.

90. Besides public scrutiny, there should be an independent body in charge of holding judges and prosecutors accountable at the same time as it protects their independence. That body should foster transparency in all disciplinary proceedings and provide defendants with

[17] See CCPR/C/YEM/CO/5, para. 17.

[18] Basic Principles on the Role of Lawyers, principle 26.

[19] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para. 25.

[20] Ibid.

procedural safeguards, including the right to present a defence and to appeal to a competent higher court.[21]

91. Indeed, the Human Rights Committee has indicated that, in order to ensure the independence of the judiciary, States should establish an independent body responsible for the appointment and promotion of judges, as well as for the application of disciplinary regulations.[22] The Committee has also recommended that States parties should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct.[23]

92. The composition, structure and mandate of those independent bodies vary from one judicial system to another, but some general guidelines should be taken into account for their functioning in order to ensure that they act in accordance with international standards.

93. In order to perform its tasks with propriety, a commission or council for the judiciary should preferably be composed entirely of members of the judiciary, retired or sitting, although some representation of the legal profession or academics could be advisable. No political representation should be permitted, in order to prevent politicization and avoid external influences that can compromise the implementation of measures to ensure the independence, impartiality, integrity and accountability of the judiciary. In addition, the independent body should manage its own budget and have enough human and financial resources to properly function with independence. It should also be accountable for its activities, in order to avoid the possible public perception that it works only for the self-interest and self-protection of the profession. Independent bodies in charge of the accountability of prosecutors could follow a similar structure, while their composition should be adapted.

94. With regard to the legal profession, an independent professional organization or bar association should be established to represent the interests of lawyers, regulate their entry to the profession, protect their professional integrity and apply disciplinary proceedings.

95. As mentioned above, the regulation, monitoring and accountability of the legal profession is usually exercised by the executive, the judiciary, or bar associations. The Special Rapporteur underlines that it is contrary to the Basic Principles on the Role of Lawyers that licenses to practise law, as well as disciplinary measures, be controlled by the executive.

96. The Special Rapporteur has consistently and strongly supported the establishment of an independent, self-regulating bar association or council to oversee the process of admitting candidates to the legal profession, provide for a uniform code of ethics and conduct, and enforce disciplinary measures, including disbarment. Such an association would not only provide a mechanism to protect its members against undue interference in their legal work, but also monitor and report on the members' conduct, ensuring their accountability and applying disciplinary measures in a fair and consistent manner (A/HRC/23/43/Add.3, paras. 87 and 88).

IV. State responsibility and the right to a remedy

97. International and regional standards recognize the civil responsibility of the State by ensuring effective remedies for persons whose human rights have been violated owing to

[21] Ibid., para. 26.
[22] See CCPR/C/ARM/CO/2-3, para. 21.
[23] See CCPR/CO/79/LKA, para 16.

wrongful conviction or miscarriage of justice.[24] That means that the civil responsibility of the State could be engaged through both individual and institutional accountability mechanisms. As a result, compensation could imply some form of reparation for damage caused following a personal error made by a judge when exercising his or her jurisdictional function or of the justice system as a whole. In that regard, effective remedies could encompass the effective recourse to a competent court or tribunal, the right to judicial protection, access to court and compensation for wrongful judicial acts.

98. In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee has emphasized that States should enact legislation ensuring that compensation can in fact be paid and that the payment is made within a reasonable period of time (para. 52). In the case of *Dumont v. Canada*, for instance, the Committee considered that delays of nine years in civil proceedings had deprived the victim of an effective remedy (communication No. 1467/2006, para. 23.6). The Committee has also recalled on many occasions that the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutors and is limited to issues of law and does not permit any review of facts and evidence.[25]

99. The Committee has consistently emphasized that the requirement to exhaust domestic remedies applies only to the extent that those remedies are effective and available.[26] The State must give details of the remedies available to the victim, together with evidence that there would be a reasonable prospect that such remedies would be effective.[27] Similarly, in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the Human Rights Committee emphasized that all branches of the State (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party to the Covenant (para. 4). It added that States parties should award reparation and appropriate compensation to individuals and noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations and taking measures to prevent a recurrence of the type of violation in question (paras. 16–17).

100. The right to a remedy is also enshrined in non-binding instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which stipulates that compensation could include an effective judicial remedy, access to court or access to administrative and other bodies. It could also encompass payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and the restorations of rights.

101. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law go further by explaining that restitution should, whenever possible, restore the victim to their original situation before the gross violation of his or her rights took place. The Principles stipulate that compensation should be provided for any

[24] See, for instance, article 8 of the Universal Declaration of Human Rights and articles 2 and 14 of the International Covenant on Civil and Political Rights.

[25] See, for instance, *Sudalenko v. Belarus*, Communication No. 1750/2008, para. 8.3, and *Kovaleva et al. v. Belarus*, Communication No. 2120/2011, para. 10.4.

[26] Report of the Human Rights Committee, A/68/40 (Vol. I), para. 163.

[27] Ibid.

economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as: physical or mental harm; lost opportunities, including employment, education and social benefits; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Satisfaction could include judicial and administrative sanctions against the persons liable for the violation, and guarantees of non-repetition, which involve, for instance, strengthening the independence of the judiciary as a means of prevention.

102. The European Convention for the Protection of Human Rights and Fundamental Freedoms includes the right to access to court (art. 6) as an important element in remedying violations, and the rights to an effective remedy (art. 13) and reparation (art. 41). In addition, Protocol No. 7 to the Convention explicitly refers to the right to compensation for wrongful conviction (art. 3).

103. In the African system, the right to compensation for a miscarriage of justice is also enunciated in the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (N, 10 (c)). More specifically, the Principles list a series of measures to be implemented, including the guarantee that anyone who has been the victim of unlawful arrest or detention is able to claim compensation (M, 1 (h)).

104. In the Inter-American system, the American Convention on Human Rights enshrines, in its article 10, the right to be compensated in the event of a miscarriage of justice and, in its article 25, the right to judicial protection.

105. The Special Rapporteur wishes to call upon States to adopt and implement a definition of remedy for a miscarriage of justice that is comprehensive and not limited to criminal cases, in order to provide effective remedies to persons whose human rights have been violated.

V. Conclusions

106. **Accountability, as a component of the rule of law, implies that nobody is above the law, including judges, prosecutors and lawyers. Judicial accountability exists to avoid the improper, inadequate or unethical behaviour of justice operators and, as such, it is closely related to judicial independence. Judicial independence is not absolute, but limited by the framework set by judicial accountability which, in turn, must respect the fundamental principles of the independence of the judiciary and the separation of powers, and its proceedings must be in line with international standards of due process and fair trial.**

107. **Judicial accountability can take many forms. Its mechanisms and proceedings should encompass not only justice operators, but also the justice system as a whole. Embracing both an individual and institutional perspective, judicial accountability should respect fundamental human rights principles, guarantee fair proceedings and follow clear procedures and objective criteria provided for by the law, and be grounded on established standards of professional conduct in order to avoid it being used as a means of interfering with the work of members of the judiciary and hampering their independence and that of the legal profession.**

108. **Important challenges remain for the implementation of judicial accountability, such as corporatism, the use of such accountability as an instrument of reprisal or external and internal pressure against justice operators and the lack of international standards to help States overcome those difficulties. The Special Rapporteur believes it is time for States to develop and adopt international standards of judicial**

accountability to guide and frame the establishment of domestic systems of judicial accountability that are effective, objective, transparent and in line with international human rights law.

VI. Recommendations

109. The Special Rapporteur makes the following recommendations with the aim of assisting States in developing and implementing appropriate and effective measures to establish judicial accountability mechanisms in line with the international principles of judicial independence and impartiality.

Legal framework on judicial accountability

110. States should cooperate to develop and adopt international standards for judicial accountability.

111. States should consider enacting specific legislation at the domestic level establishing a comprehensive system of judicial accountability that is effective, objective, transparent and in line with their international human rights obligations.

Forms of judicial accountability

112. A clear set of standards should be established on how to exercise supervisory powers of accountability, so that justice operators and the judicial institution are not held to account arbitrarily.

113. The relationship between the individual to be held accountable and the forum, body or institution to which he or she must respond also needs to be clearly defined.

114. States should also develop international guidelines on the application of judicial immunity. In accordance with those guidelines, States should establish domestic norms on judicial immunity in order to avoid abuses.

Individual accountability

115. Individual accountability should be applied to all justice operators, that is, judges, prosecutors and lawyers at all levels of their respective careers.

116. Specific individual accountability mechanisms should include, but are not limited to, the obligation to write individual reasoned judgments or opinions in a language that is understandable to the beneficiaries of justice; the possibility of explaining personal views on the law and the constitution to the general public; and disclosing one's financial and other assets through an official registration system.

117. Individual accountability should also encompass extrajudicial conduct, other permitted professional activities and the private lives of justice operators.

118. Justice operators must be provided with clear rules of conduct and ethics in order to ensure that they behave in accordance with accepted standards that are appropriate to their professional functions.

Institutional accountability

119. The justice system in its entirety should be submitted to accountability mechanisms to ensure that it is functioning with independence, competence, objectivity and impartiality.

120. A code of ethics and conduct should be established for all justice operators, with the participation of their respective associations and representatives. Such codes should be applied in a consistent and transparent manner, with full respect for the fundamental guarantees of fair trial and due process.

121. States should improve the transparency of the justice system. Hearings and decision-making should be made public so as to permit public scrutiny of the work of justice operators. Decisions should be rendered in written form, be reasoned and be published on databases and websites in order to make them truly accessible and free of charge.

122. The transparency of the justice system should also encompass mechanisms relating to other State powers, civil society, the media, the police, public prosecutors and human rights commissions, among others.

Accountability mechanisms and proceedings

123. Accountability mechanisms and proceedings should respect the fundamental guarantees of fair trial and due process and should be implemented by an independent and impartial body. Accountability procedures should be limited to instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute.

124. All justice operators should be provided with training and education on their respective codes of ethics and conduct, rules of procedure and the consequences if those norms are breached.

Institutions and bodies in charge of overseeing the accountability of the justice system

125. Judicial accountability should be undertaken through an independent body. That body should have the role of protecting judicial independence and promoting judicial accountability.

126. Regarding the judiciary, the independent body should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted. In addition, the independent body should manage its own budget, have enough human and financial resources to carry out its mandate and be accountable for its activities.

127. Independent bodies in charge of the accountability of prosecutors could follow a similar structure to those for judges.

128. An independent professional organization should be established to represent the interests of lawyers, oversee the process of admitting candidates to the profession, promote their continuing education and training, protect their professional integrity and enforce disciplinary proceedings in a fair and consistent manner.

129. The right to have disciplinary decisions reviewed by a higher judicial tribunal should be guaranteed for judges, prosecutors and lawyers alike.

State responsibility and the right to a remedy

130. The judiciary and the justice system as a whole engage the responsibility of the State. States should therefore provide effective remedies to individuals who have suffered damage owing to wrongful convictions or any other miscarriage of justice.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul

Addendum

Mission to the Russian Federation*

Summary

The Special Rapporteur on the independence of judges and lawyers undertook an official visit to the Russian Federation from 15 to 25 April 2013. The purpose of the visit was to examine the progress made by the country to ensure the independence and impartiality of judges, magistrates and prosecutors, and the free exercise of the legal profession. The Special Rapporteur also explored challenges relating to the fair and proper administration of justice, and equal access to justice.

During her visit, the Special Rapporteur met with a wide range of high-ranking government officials at both federal and regional levels, judges from courts of various instances, prosecutors, lawyers, academics and representatives of United Nations agencies and civil society in Moscow, Saint Petersburg, Rostov-on-Don, Azov and Nizhny Novgorod.

The Special Rapporteur starts her report with a short overview of the justice system, and then focuses on the challenges to the independence and impartiality of the judiciary and the proper administration of justice. Reference is made to (a) the independence and impartiality of judges, including their appointment, conditions of services and tenure, as well as public perception; (b) developments and shortcomings in the administration of justice, particularly the powers of court presidents, the allocation of cases, the application

* The summary of the present report is circulated in all official languages. The report itself, contained in the annex to the summary, is circulated in the language of submission and in Russian only.

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of international law, and access to information; (c) accountability and disciplinary proceedings for judges; (d) problems related to a fair trial and judicial proceedings, including issues related to pretrial detention, the presumption of innocence and equality of arms; and (e) issues regarding access to justice, including jury trials, the execution of judicial decisions, legal aid and the lack of an administrative court system. The Special Rapporteur then highlights good practices on juvenile justice, the role of prosecution services, the worrying situation of lawyers, and capacity-building.

The Special Rapporteur expresses strong concern about allegations of direct and indirect threats to, and improper influence, interference and pressure on the judiciary, and threats, intimidation, attacks, groundless prosecution and, in the gravest cases, murder of lawyers who discharge their professional duties. She notes that those trends constitute serious setbacks for the independence of the judiciary and the implementation of the rule of law in the Russian Federation. The report concludes with recommendations.

Annex

[English and Russian only]

Report of the Special Rapporteur on the independence of judges and lawyers on her mission to the Russian Federation

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I. Introduction

1. The Special Rapporteur on the independence of judges and lawyers, Ms. Gabriela Knaul, undertook an official visit to the Russian Federation from 15 to 25 April 2013. She examined the progress made by the country in implementing its obligations under international law to ensure the independence and impartiality of judges, magistrates and prosecutors and the free exercise of the legal profession. She also explored the challenges relating to safeguards for and protection of the independence of judges, lawyers and prosecutors, the fair and proper administration of justice, and equal access to justice.

2. The Special Rapporteur visited Moscow, Saint Petersburg, Rostov-on-Don, Azov and Nizhny Novgorod. She met with a number of senior Government officials, including the Deputy Minister of Justice, the Deputy Minister of Internal Affairs, and the Governors of Saint Petersburg and the Rostov region; the Chair of the Constitutional Court, the Chief Justice of the Supreme Court, the Deputy Chair of the Supreme Arbitration (*Arbitrazh*) Court, federal judges and justices of the peace of different courts; the Chair and members of the High Qualification Collegium of Judges; the Deputy Prosecutor General, and members of prosecution services in Moscow and the regions; the Chair and members of the Presidential Council for Civil Society and Human Rights; the Chair of the Civic Chamber Committee on Citizens' Security and Interaction with Law Enforcement and Judicial Bodies; the Russian Federation Commissioner for Human Rights, and the Commissioners for Human Rights of Saint Petersburg, the Rostov region and the Nizhny Novgorod region; the Rector of the Russian Academy of Justice; lawyers and members of bar associations; non-governmental organizations (NGOs); and United Nations agencies.

3. The Special Rapporteur would like to express her gratitude to the Government of the Russian Federation for the invitation and the support provided to her throughout the visit. She also wishes to thank the senior human rights adviser of the United Nations and his staff for their invaluable cooperation and assistance.

II. The justice system

4. Following the fall of the Soviet system, the State undertook a number of reforms of the justice system aimed at strengthening the independence of the judiciary and putting an end to the political subordination of judges. The achievements and shortcomings of the first waves of efforts to establish an independent and impartial justice system were analysed by the former Special Rapporteur, Leandro Despouy, during his visit to the Russian Federation in May 2008 (A/HRC/11/41/Add.2). His report also highlighted some of the then-recent reforms and developments affecting the judicial system. In the present report, the current Special Rapporteur examines the reforms and developments undertaken since Mr. Despouy's visit and makes her recommendations in the light of her own findings.

A. Constitutional provisions related to the judiciary

5. The Constitution of the Russian Federation enshrines the principle of the separation of powers in articles 10 and 11. Judicial authority is regulated by chapter 7, which establishes safeguards for the independence of the judiciary, guaranteeing the irremovability, inviolability and immunity of judges, the public nature of judicial proceedings, the principle of equality of arms and the financial autonomy of courts. Those safeguards are further regulated by a federal law.

6. The Constitution also guarantees a comprehensive set of fundamental rights and freedoms, including civil, cultural, economic, political and social rights. It enshrines

guarantees relating to the rights to a fair trial, due process, equality before the law, freedom from arbitrary detention, presumption of innocence and compensation.

B. Legal and institutional framework

7. The independence of the judiciary is regulated by Federal Act No. 3132-1 "On the Status of Judges" of 26 June 1992, which has undergone several amendments. The Act establishes (a) selection procedures; (b) the powers of the president of each court and the procedure for their appointment; (c) the duties, independence, terms of office, disciplinary responsibility, immunity and conditions of work of judges; (d) the different bodies of the judicial community; and (e) the qualification collegia.

8. Over the last decade, the Russian authorities have implemented two consecutive federal justice reform plans (2002–2006 and 2007–2011) to support judges' work, raise their salaries and improve their working conditions, modernize the system of administration of justice, court premises and technical equipment, and make the work of the courts more transparent. Several laws and amendments have been passed to support the reforms.

9. The recently approved federal programme for the development of the judicial system for the period 2013–2020 targets the execution of judicial decisions, the development of legal assistance and access to justice. According to information received, the new plan was developed by the Ministry of Economic Development rather than the Supreme Court, and its implementation will be entrusted to the Ministry.

10. In 2001, a federal constitutional bill on administrative courts was submitted to the Parliament (Duma) and has been pending ever since. On 21 May 2013, the Duma adopted the first reading of a draft federal code of administrative procedure. The Duma is expected to consider the draft code in second reading during its spring 2014 session. According to information received from the Government, since 2011 several steps were taken towards the specialization of judges in administrative matters.

11. In February 2014, the Duma passed an amendment to the law "On the Supreme Court of the Russian Federation and Prosecutor's Office of the Russian Federation". One of its main elements is the abolition of the Supreme Arbitration Court and the transfer of its jurisdiction and functions to the Supreme Court, thereby *de facto* integrating the system of courts of arbitration into the system of courts of general jurisdiction. The Special Rapporteur is concerned about the amendment, as the courts of arbitration have developed a more efficient, modern and transparent administration of justice than the courts of general jurisdiction. The arbitration courts represent a model to be followed by the general jurisdiction courts in the Russian Federation.

C. The court structure

12. . The Russian judiciary is founded in the civil law system, the main principles of which are codified into a referable system of law.

13. The Russian court system is enshrined in the Constitution and in the Federal Constitutional Act "On the Court System of the Russian Federation". The system comprises all courts, including federal courts and the courts of the constituent entities of the Russian Federation. The structure of the court system is described in detail in the report of the Special Rapporteur's predecessor (A/HRC/11/41/Add.2, paras. 12–16).

III. Challenges to the independence and impartiality of the judiciary and the proper administration of justice

A. Independence and impartiality of judges

14. During her visit, the Special Rapporteur heard many allegations of direct and indirect threats to – and improper influence, interference and pressure on – the judiciary, which continue to adversely affect its independence and impartiality. An independent judiciary is essential if the courts are to fulfil their democratic role as guardians of the rule of law in the country, ensuring that everyone, including State agents, is treated equally before the law.

15. The Special Rapporteur is concerned about the many reported attempts by State authorities and private actors alike to exercise control over the judicial system — interference often referred to as "telephone justice". While she was occasionally told that "telephone justice" does not happen anymore, many interlocutors said that interference with the judiciary from the executive or other powerful stakeholders is still entrenched in the system.

16. In some regions, especially in small or remote places, judges are said to maintain close links with the executive and prosecution services. Despite its prohibition in the law, the interference is reportedly usual and constitutes a major factor in the forces that undermine the independence and impartiality of the judicial system. The worrisome perception that judges already know what they are going to decide before proceedings are completed is reinforced by the frequent lack of justification for verdicts rendered, including decisions on pretrial detention.

1. Judicial appointment

17. Judges of the Constitutional, Supreme and Supreme Arbitration Courts are appointed by the Federation Council upon nomination by the President of the Russian Federation. Other federal judges are appointed by the President on the recommendation of the relevant qualification collegium. Justices of the peace and judges of constitutional (charter) courts are, in turn, elected by the local legislative organ or the population according to the relevant regional legislation. The Special Rapporteur is concerned that the current mechanism for appointing judges may expose them to undue political pressure. Appointments or nominations by the President can have a strong influence on judges' attitudes and behaviour, particularly concerning representatives of the executive.

18. Qualification collegia are bodies of judicial self-regulation that are established at the regional (Judicial Qualification Collegia) and national (the High Qualification Collegium) levels. Their members are judges, representatives of the public and a representative of the President of the Russian Federation, and they play a key role in the appointment, promotion and dismissal of judges. The Special Rapporteur considers that any representation from the executive, and to the extent possible the legislative, should be avoided. An appointment body that is independent of both the executive and legislative branches of Government is essential in order to counter politicization in the appointment of judges and minimize the likelihood of judges having improper allegiance to interests other than those of fair and impartial justice.

19. Prior to the appointment itself, the selection process of judges is worrying. While the law is clear regarding the criteria that have to be fulfilled to become a judge, the Special Rapporteur was told that, in practice, the mandatory examination lacks both transparency and anonymity. She is concerned about reports that the examination process can be, and often is, manipulated by the president of the court where the vacancy is located. There is

also a real risk that newly appointed judges may feel indebted towards the president of their court. When selection criteria are objective, clear, based on merit, transparent, and well-publicized, public understanding of the process increases and the perception of fair selection or appointments is strengthened. At the time of finalizing the report, the Government informed the Special Rapporteur that the Duma was considering several amendments that aimed at improving the examination process.

20. The Special Rapporteur heard claims that, as a result of the current selection and appointment procedures, lawyers interested in entering the judicial profession suffer *de facto* discrimination and rarely succeed. Reportedly, the majority of judges have previously worked as prosecutors, court assistants or members of law enforcement services. While the Special Rapporteur could not verify the veracity of those allegations, they point to a serious dysfunction in the selection and appointment procedures. Such procedures should be above all reproach in order to avoid giving the perception that they are partial and discriminatory.

2. Conditions of service and security of tenure

21. In order to safeguard the independence of judges, their status, term of office, independence, security, remuneration, conditions of service, pension and retirement age should be adequately secured by law. Throughout the Russian Federation, the material conditions of service of federal judges have improved dramatically in recent years. However, at the regional level, particularly in the case of justices of the peace, the introduction and implementation of measures to improve conditions of service seem to have taken more time and to have made less progress.

22. According to the Basic Principles on the Independence of the Judiciary, "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists" (principle 12). In that context, abolishing the three-year probationary period at the beginning of a judge's career was an important step to ensure their independence. However, fixed-term mandates still exist for justices of the peace.

3. Public perception and confidence

23. The Special Rapporteur was informed that, according to recent surveys, the general public reportedly has very limited confidence in the judiciary. The judicial system is perceived as corrupt — one in which judges adopt politically motivated decisions that aim to protect only the interests of the State. The lack of confidence in the judicial system seems to be exacerbated by the fact that investigators, lawyers and bailiffs are also perceived as corrupt.

B. Administration of justice

1. Powers of the president of the court

24. The Special Rapporteur is particularly concerned about the allegedly extensive powers of court presidents, which go far beyond their role of *primus inter pares*. She heard many reports of judges receiving instructions or orders from their court president. The Bangalore Principles of Judicial Conduct clearly state that, in performing judicial duties, judges must be independent of judicial colleagues in respect of decisions which they are obliged to make independently (principle 1.4). The Special Rapporteur was also told that judges' career progression largely depends on their court president, who can play a decisive role in everything from promotion to disciplinary proceedings.

25. Presidents and deputy presidents of all courts of general jurisdiction are appointed by the President of the Russian Federation on recommendation of the Chief Justice of the Supreme Court for a six-year term, which is renewable once. The Chairperson of the Constitutional Court and the Chief Justices of the Supreme Court and Supreme Arbitration

Court are appointed by the Federation Council on the recommendation of the President. In many courts, particularly at local level, court presidents allegedly often maintain strong ties with other State authorities, including the executive. Such ties should be combatted, as they represent a threat to the independence, impartiality and objectivity of the judiciary.

2. Allocation of cases

26. The Special Rapporteur heard about the apparent lack of appropriate procedures for the assignment of cases to individual judges. In courts of general jurisdiction, the president of the court assigns cases to judges, which is of concern because, in the absence of an appropriate and transparent procedure for the allocation of cases, the judicial system becomes vulnerable to manipulation, corruption, external and internal pressure and interference. It is particularly troubling that the president of the court can use the current procedure for allocating cases as an instrument to reward or punish judges or give high-profile cases to judges whose decisions can be easily influenced.

3. Application of international and regional human rights law at domestic level

27. In the Russian Federation, international treaties that are duly ratified in accordance with domestic legal procedures become part of the domestic legislation of the State, and can, in theory, be directly applied by national courts and directly invoked by private individuals. According to the Supreme Court, judgments of the European Court of Human Rights (hereafter European Court) are immediately applied by the relevant national authorities. The Supreme Court publishes all international and regional instruments ratified by the Russian Federation, as well as the judgments of the European Court. The Supreme Court also regularly sends judges to Strasbourg for training on the European Convention on Human Rights (hereafter European Convention) and the European Court. However, despite international law being fully integrated at the domestic level and the efforts of the Supreme Court to train its judges, the Special Rapporteur is concerned that some members of the judiciary still perceive the judgements of the European Court as an intrusion in the domestic affairs of the State and as interference with their own independence.

28. In 2007, the Supreme Court issued a regulation recommending that judges use international norms and European Court jurisprudence in their rulings. On 27 July 2013, the Supreme Court adopted another resolution on the application of the European Convention and its protocols by domestic courts. Nevertheless, it is still extremely rare for judges to refer to international norms and standards and international or regional jurisprudence in their decisions.

29. Russian authorities do not always abide by the judgements of the European Court. The Committee of Ministers of the Council of Europe, which supervises the execution of judgments of the European Court,[1] has adopted several decisions and resolutions exhorting the Russian Federation to comply with the judgements of the Court. In general, the authorities comply with measures concerning monetary compensation ordered by the Court. The Special Rapporteur emphasizes that the authorities are also obliged to comply with the other measures of redress and reparation included in the judgements of the Court, including amending legislation to prevent further violations when so requested, and individual measures such as re-initiating judicial proceedings. Recent legislative amendments tend to suggest that the authorities are trying to address this issue.

[1] See article 46 of the European Convention on Human Rights, as amended by Protocol No. 11.

4. Access to information and transparency

30. The Special Rapporteur welcomes the progress made by the State in improving the transparency of the justice system, including with the adoption of the Act "On access to information about the activities of the courts in the Russian Federation".

31. Nevertheless, she is concerned that, in practice, in some cases it remains difficult for the general public to have access to judicial decisions, particularly those adopted by justices of the peace, and to information on legal proceedings. In an effort to address this issue, the Supreme Court has developed a programme on access to information aimed at publishing information about decisions adopted by domestic courts and the status of proceedings, including hearings or cases that have been suspended.

32. The Special Rapporteur also regrets that information on all court proceedings at all levels of the court system nationwide is not yet accessible to the public on the Internet. Some stakeholders deplore the fact that audio recordings of hearings are not yet obligatory and that the minutes of hearings are not always drafted or made available to the public. Reportedly, parties to legal proceedings often do not have access to the minutes at the end of a hearing. As a result, the minutes can be manipulated and tailored to the decision taken, which can affect people's right to adequately prepare their defence or present an appeal.

33. According to information received, the Supreme Arbitration Court has been quite dynamic in spearheading the implementation of changes and assessing the performance of its courts. The arbitration court system has put in place an electronic system of exchange of documents between courts, a database with information on the courts' procedures, including all judicial decisions, and a sophisticated and effective electronic system of case distribution. As a result, arbitration courts are considered to be the most efficient courts in the Russian Federation and enjoy a higher rate of public confidence than their counterparts in the general jurisdiction.

C. Accountability and disciplinary proceedings of judges

34. In the Russian Federation, the qualification collegia are in charge of examining complaints of a disciplinary nature. The High Qualification Collegium has three months to examine a complaint, while the Judicial Qualification Collegia at the regional level have one month to issue a ruling. There are now three disciplinary measures they can adopt to sanction judges: a notification, a warning or dismissal.

35. In 2010, the Disciplinary Judicial Presence was established as a specialized federal court to hear appeals against decisions on the dismissal of judges adopted by qualification collegia, including the High Qualification Collegium. The Disciplinary Judicial Presence does not have jurisdiction to consider appeals against decisions on other disciplinary measures. The Disciplinary Judicial Presence is composed of six judges — three Supreme Court judges and three Supreme Arbitration Court judges. Before the creation of the Disciplinary Judicial Presence, such complaints were brought before the Supreme Court. The decisions reached by the Disciplinary Judicial Presence are final. According to information received from the Government, a draft bill adopted in first reading by the Duma in January 2014 would terminate the Disciplinary Judicial Presence. To replace the Presence, a new disciplinary collegium would be established within the Supreme Court.

36. While the request to launch disciplinary proceedings against judges can come from various sources (judges, other State agencies and officials, or members of the public, among others), the Special Rapporteur is concerned about the role played by court presidents. She was told by different sources that court presidents are entrusted with extensive powers, including in disciplinary procedures, and in some instances do use their position to improperly influence the judicial decisions of the judges of their courts.

37. The Special Rapporteur also heard with concern that in practice judges can be dismissed for the decisions they take, such as having a high acquittal rate or for releasing a suspect from custody. It appears that, in a number of high-profile cases, judges were dismissed for applying the law against the instructions they had received. In a case where the European Court found a violation of article 10 of the Convention,[7] the dismissed judge was compensated but not reinstated. As a result, judges are reluctant to adopt decisions that could be out of line with the ideas or instructions received from the president of their court for fear of repercussions or dismissal.

38. The Special Rapporteur is troubled that hundreds of judges have reportedly been dismissed in recent years, on average some 40 to 50 judges are dismissed every year. Even taking into account the size of the country and the number of judges — approximately 30,000 — the number is high. One issue highlighted during the visit is that there was no time limit for commencing disciplinary proceedings against judges. Apparently, in some instances where judges were suspected of misconduct, instead of launching the appropriate investigation and disciplinary procedures, the authorities in possession of incriminating information kept it as compromising material and used it to exercise strong pressure over judges. In a positive development, the Special Rapporteur was informed that an amendment to the law "On the Status of Judges" was passed on 3 July 2013 introducing a limitation period of two years for taking disciplinary action against a judge from the time of the misconduct complained of or six months from the moment when the alleged misconduct first became known, provided that such knowledge is attained within two years of the act of misconduct itself. The new provision provides an important safeguard and should be strictly adhered to.

39. A new code of ethics was adopted in December 2012. Many people claim, nevertheless, that it only serves to provide a pretext for disciplinary proceedings to get rid of judges who are inconvenient and/or do not follow orders.

40. The Special Rapporteur wishes to highlight the fact that disciplinary proceedings should be impartial, objective and transparent, and aimed at holding judges and other judicial actors to account in cases of misbehaviour or incapacity to discharge their duties. She further wishes to underline that, in accordance with the Basic Principles on the Independence of the Judiciary, judges are entitled to a fair hearing under an appropriate procedure which should be subject to an independent review. Disciplinary proceedings should not, therefore, be used as a tool to pressure, threaten or control judges and judicial actors.

D. Fair trial and judicial proceedings

1. Pretrial detention

41. The Special Rapporteur is highly concerned about reports that judges order pretrial detention as a rule rather than an exception. Domestic legislation provides that pretrial detention should be exceptional, and judges should clearly explain in their decisions why alternative measures are not appropriate in a particular case. The Special Rapporteur heard of cases in which defendants were held in pretrial detention despite the fact that the maximum penalty prescribed in law for the violation allegedly committed was a fine. Such instances are unacceptable since they pervert the essence of the law and the principle of legality.

42. Cases of prolonged pretrial detention are not uncommon, and in some instances persons are held in pretrial detention for longer than the maximum sentence they could

[7] *Kudeshkina v. Russia*, No. 29492/05, 26 February 2009.

receive. The complexity of a case cannot be legitimately invoked as a justification for prolonged pretrial detention.

2. Presumption of innocence

43. The Special Rapporteur is troubled that concerns regarding respect for the fundamental principle of the presumption of innocence have not been addressed by the authorities. The principle is enshrined in the Constitution and the Criminal Procedure Code and the burden of proof for the charges lies with the prosecution. Nevertheless, as noted by her predecessor, most of the court rooms where criminal trials are held continue to be equipped with a metal cage where the defendant is held (A/HRC/11/41/Add.2, para. 37). Some courts were upgraded with a wooden box equipped with glass windows instead of the simple metal cages. Both cages and boxes are allegedly used for the security of the defendants.

44. Whether it is in metal cages or wooden boxes, having the defendants go through their trial sitting in such constructions is a serious breach of the presumption of innocence. Some judges affirmed that the cages are not seen as a problem, which casts doubt on their understanding of that fundamental principle of law.

45. Another related issue is the extremely low acquittal rate. As indicated by the former Special Rapporteur, it is about 1 per cent (A/HRC/11/41/Add.2, para. 37), which would suggest that the presumption of innocence is not consistently respected in practice. According to many sources, it is easier for judges to ignore the poor quality of an investigation rather than take the responsibility of acquitting the defendant. Some judges seem to be unaware of their duty to acquit the accused when the prosecutor fails to provide sufficient evidence for his or her prosecution. In other instances, judges are said to be under pressure from the prosecution to issue a guilty verdict. Interestingly, that attitude does not seem to apply to State officials and law enforcement officials, who are reportedly 20 times more likely to be acquitted for an offence than other persons.

3. Equality of arms

46. The right to equality before the courts and tribunals, enshrined in article 14 of the International Covenant on Civil and Political Rights, guarantees the principles of equal access and equality of arms, and ensures that parties to legal proceedings are treated without any discrimination (CCPR/C/GC/32, paras. 12 and 13). Equality of arms means that the same procedural rights are to be enjoyed by all parties, unless distinctions are provided for by the law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. The principle also applies to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.

47. Many sources complained that lawyers in the Russian Federation are not given access to material and evidence in the same way as the prosecution. In many instances, lawyers are granted very limited time to examine evidence in the possession of the prosecution services. Under such circumstances, it seems extremely difficult for lawyers to prepare their cases and represent their clients adequately.

48. In addition, the general perception is that the defence team has no meaningful participation in court. Under the Criminal Procedure Code, lawyers have a right to collect documentation and evidence on a case, thus conducting a sort of parallel investigation, but in practice they can reportedly only include information they receive from the investigators or the prosecution. Investigators are unlikely to include exculpatory evidence, and without their authorization, evidence cannot be heard in court. In some instances, lawyers were reportedly not allowed on court premises even though they showed their identification.

E. Access to justice

1. Jury trials

49. The law provides for the use of jury trials for a limited category of serious crimes. One of the most remarkable results of jury courts seems to be that acquittal rates are significantly higher than when cases are heard by judges — about 20 per cent as opposed to 1 per cent of cases heard by judges. Several reasons have been suggested to justify the difference in acquittal rates, including: (a) juries actually examine the case and the evidence provided, which is often very poor; (b) contrary to judges, members of a jury are not afraid to acquit the accused since it has no impact on their jobs; and (c) in general, it is more difficult to pressure all the members of a jury.

50. For defenders of the jury system, jury trials seem to have brought hope of fairer, more independent and more impartial justice. Opponents, who are said to include members of the prosecution services and the executive, have tried — and succeeded to a certain degree — to progressively sideline and reduce the jurisdiction of jury courts. A recent bill on victims, which at the time of the visit was in its first reading before the Duma, excludes the purview of jury courts in the case of certain categories of victim, such as juveniles. Supporters of jury trials are nevertheless campaigning to broaden their jurisdiction; a bill was prepared that extends the jurisdiction of jury courts not only to regional level, but to district level.

51. According to information received, about 25 per cent of acquittals pronounced by juries are later overturned, thus returning the cases to lower courts that do not have jury trials. According to the former Special Rapporteur, the selection of jurors is also problematic (A/HRC/11/41/Add.2, para 26). Jurors should be chosen randomly. In reality, no verifications are carried out. The Special Rapporteur was told of cases in which persons external to the process had access to lists of potential jurors, thus undermining the random selection process. She wishes to underline the fact that jury courts are not always unbiased, as they can be influenced, especially in tight communities that have strong family or tribal links. However, that should not constitute grounds for reducing the jurisdiction of the institution of jury trials, but rather constitute an incentive to reinforce the selection procedures and the protection of jury members, as well as ensuring that all the safeguards for their independence are put in place and implemented.

2. Execution of judicial decisions

52. The enforcement of judicial decisions remains an issue of great concern in the Russian Federation, even though the Constitutional Court clearly stated in a decision that the non-execution of judicial sentences constitutes a violation of constitutional rights. The magnitude of the problem is immense: reportedly, only 50 to 60 per cent of court rulings are implemented. The lack of execution of judicial decisions is the main reason for filing cases against the Russian Federation before the European Court.

53. The bodies responsible for executing judicial decisions fall under the responsibility of the Ministry of Justice. They reportedly have difficulties dealing with their high workload and apparently have some serious organizational issues. Corruption is also said to be rampant among such services. It was reported that the salary of bailiffs is insufficient, making them vulnerable to corruption.

54. In this context, a Federal Act "On Compensation for Infringement of the Rights to Access to Legal Proceedings or Enforcement of a Judicial Act within a Reasonable Period" was adopted in 2010. The Act's main purpose is the compensation of victims of such infringements, but it was hoped that in the longer term it would also push the authorities to directly address the issue of lack of enforcement of judicial decisions. Nonetheless, the majority of interlocutors cited the execution of judicial decisions as one of the main problems regarding access to justice. To date, it is not clear how the Federal Act has been

implemented in practice and if it has had a positive effect on the general issue of lack of enforcement of judicial decisions.

55. The Special Rapporteur believes that, if the enforcement of judicial decisions is to remain under the responsibility of the Ministry of Justice, a strong commitment is required from the executive to ensure that there is no interference in or any kind of improper control over judicial decisions.

3. Legal aid

56. The right to free legal assistance, which is enshrined in federal legislation, is limited to criminal cases, with the exception of a very narrow list of cases in which legal aid must be provided in civil proceedings.

57. Defence lawyers are appointed *ex officio* and fall under the exclusive purview of bar associations. A serious issue that was brought to the attention of the Special Rapporteur, and which directly affects the quality of court-appointed lawyers, is that their salary is disproportionately small — about US$ 17 a day, compared to the US$ 40 or so they would earn for a normal consultation. Moreover, that sum is totally inadequate considering the service that has to be provided. As a result, lawyers who are appointed do not always serve the interests of their clients properly, in breach of their own professional responsibilities. Often, it is less qualified and less experienced lawyers are appointed to provide legal aid.

58. Federal legislation on legal aid excludes assistance to victims of crimes and in non-criminal matters. Hence, legal aid is not available to persons charged with administrative offences, which often carry sentences akin to those in criminal cases, or victims of crimes who take part in criminal or civil proceedings. Illegal migrants, who can be held for up to two years in special detention centres, are also not eligible for legal aid.

59. Some regions have begun to address the gaps in the provision of legal aid by adopting their own legislation to extend the eligibility criteria. Saint Petersburg, for instance, now has a city law on legal aid for indigent persons. In Nizhny Novgorod, the bar association has created a special unit to provide legal aid. Work is also being undertaken with legal clinics in universities. Since January 2013, all residents of Rostov region have been eligible for legal aid in all cases.

60. NGOs often provide some level of legal aid for persons who are not otherwise eligible for it under federal law. The Special Rapporteur considers their work invaluable. She is therefore extremely concerned about the searches and inspections of NGO premises and documents requested by the Prosecutor General, which started shortly before her visit and increased immediately after her departure. The inspections were reportedly carried out regardless of the fact that no information of a real or suspected violation was received, contrary to the provisions of the law.

61. According to the Ministry of Justice, discussions are under way regarding legislative amendments to ensure that legal aid from qualified professionals is available in full compliance with international standards. In May 2013, a meeting with the International Bar Association was scheduled to discuss the issue.

4. Administrative court system

62. Administrative cases are heard by courts of general jurisdiction or by arbitration courts, but a number of interlocutors supported the establishment of an administrative court system. At present, the Russian Federation has an administrative code, but not yet a code of administrative procedure, which, allows judges to take arbitrary and potentially harsh decisions in cases concerning violations of administrative law, such as administrative violations committed in the context of peaceful protests. Moreover, without an administrative procedural code, it is difficult for judges to effectively consider complaints concerning the actions of State authorities, including administrative decisions, or their

failure to act. The Special Rapporteur notes with appreciation that the Duma finally approved the first reading of a draft federal code of administrative procedure in May 2013.

63. According to some interlocutors, the main issue preventing the establishment of administrative courts is the financial burden. Some people support the idea of establishing specialized administrative chambers within the framework of the courts of general jurisdiction as an initial and less costly step. The draft federal code of administrative procedure does not entail the creation of a separate system of administrative courts; the courts of general jurisdiction will be competent to hear administrative cases. Regardless of the system that will be set up, judges will need to be adequately trained.

64. Echoing one of the former Special Rapporteur's recommendations, the current Special Rapporteur urges the Russian authorities to swiftly adopt a comprehensive code of administrative procedure and to seriously consider establishing an administrative court system as a means of strengthening mechanisms to fight corruption and ensuring the liability of State officials (A/HRC/11/41/Add.2, para. 97).

F. Juvenile justice and the Rostov region model

65. During her visit, the Special Rapporteur had the opportunity to visit the Rostov region, which was the first Russian region to undertake a thorough reform of the juvenile justice system. The initiative was based on a resolution of the Plenum of the Supreme Court from 2000, which highlighted the need to bring the juvenile justice system in the Russian Federation into line with international human rights standards. Subsequent developments were guided by the 2003 resolution of the Plenum of the Supreme Court highlighting the fact that Russian judges are directly bound by international norms and standards, which should take precedence over domestic legislation in case of conflict.

66. The reform was initiated by judges of Rostov Regional Court and implemented through the joint endeavours of Rostov Regional Court, the administration of the Judicial Department of Rostov Region and the United Nations Development Programme. Seminars and conferences involving judges, prosecutors, representatives from legislative and administrative bodies, social services and foreign experts played an important role in the development of the programme.

67. The Rostov model is based on a rehabilitative approach to juvenile justice with four central elements: (a) the specialization of judges; (b) the specialization of the judicial apparatus, particularly the introduction of social workers in courts; (c) the establishment of the necessary regional legal and institutional framework, including a functioning social service system; and (d) the establishment of coordination mechanisms between all the actors working in the field of juvenile justice. The comprehensive juvenile justice model is rooted in the principle of the best interests of the child.

G. Prosecution services

68. According to several sources, the Prosecutor's Office (the *prokuratura*) is the least reformed institution in the Russian Federation. The Prosecutor's Office is said to exercise excessive prerogative in criminal cases and in its general oversight function. In the criminal justice system, the Prosecutor's Office allegedly plays a significant role in pressuring judges; several judges were dismissed in the past for not having followed the prosecution's instructions.

69. Prosecutors also have broad supervisory powers over the executive and legislative branches, investigative bodies and administrative agencies. The Prosecutor's Office can therefore summon members of those institutions to provide explanations in relation to any matter subject to the prosecutor's supervision or investigation. The grounds for supervisory

powers are excessively broad, and the whole procedure requires clarification in the law. As advocated by the former Special Rapporteur, consideration should be given to transferring those supervisory functions to an independent body separate from the prosecutors or the judiciary (A/HRC/11/41/Add.2, para. 100).

70. In the Russian Federation, the Prosecutor General and the Deputy Prosecutor General are appointed by the Federation Council on the recommendation of the President. Other federal prosecutors are appointed by the Prosecutor General. Non-federal prosecutors are appointed by the Prosecutor General in consultation with the relevant regional entity, and are only subject to the authority of the Federal Prosecutor General. No grounds for dismissal seem to be prescribed by law, which, in the opinion of the Special Rapporteur, opens the door to undue pressure and influence on prosecutors, in particular from the executive.

71. In September 2007, an investigative committee was established to separate the two functions of pretrial investigation and prosecution. The aim of separating the two functions was to eliminate bias, or the perception of bias, in investigations, especially with regard to corruption cases or cases involving State agents.

72. The investigative committee has exclusive jurisdiction over pretrial investigation into serious and particularly serious crimes, including rape and murder. The police carry out investigations of ordinary offences that do not fall under that jurisdiction. The number of cases dealt with by the police remains higher than the number investigated by the committee; the police are in charge of investigating administrative offences which are prosecuted and can lead to prison sentences.

73. While the legal oversight of all investigations remains with the prosecution, frictions and rivalry regarding who is really in charge of the investigation process continue to exist.

74. The *raison d'être*, efficiency and quality of the work of the investigative committee have been questioned. Investigators, like police officers, are often accused of abuse of power and corruption. In reaction to those criticisms, in 2012 a special unit was created within the investigative committee to deal with crimes committed by law enforcement representatives. However, the special unit is said to be understaffed; the 60 individuals who cover the whole country reportedly face an immense workload. With the exception of a handful of cases, the special unit has not yet had a visibly positive impact, which is not surprising given the means placed at its disposal.

75. The Special Rapporteur is particularly concerned about reports that allegations of torture are not properly investigated, particularly allegations of torture during interrogation or pretrial detention. As a consequence, it seems that evidence obtained under torture continues to be used in violation of relevant international standards, such as the Guidelines on the Role of Prosecutors, which prohibit the use of evidence obtained through such methods and require the adoption of adequate measures to ensure that those responsible for using such methods are brought to justice (guideline 16).

H. Lawyers

76. In the Russian Federation, the Federal Act "On Legal Practice and the Bar" secures the independence of the legal profession by providing lawyers with a strong set of rights. Nevertheless, the Special Rapporteur was told that the Act has not always been implemented or respected. She was also told of attempts to modify the legislation governing the role and independence of the legal profession, which would have the effect of restricting that independence.

77. The bar is a self-managed independent body. Qualification boards exist in each chamber of lawyers and are in charge of examinations, selection and disciplinary measures, among others. However, a representative of the respective federal or regional Ministry of

Justice sits on each qualification board. In addition, the registration of lawyers falls under the purview of the Ministry of Justice. The Special Rapporteur is concerned that the legal profession may thus be conditioned or controlled by the executive branch.

78. That fact that the registration of lawyers is the responsibility of the executive is of concern and is inconsistent with the Basic Principles on the Role of Lawyers. Indeed, while lawyers are not expected to be impartial in the same way as judges, they must be as free from external pressures and interference as judges. When lawyers cannot freely and independently discharge their duties, the door is opened for both private and public actors who seek to influence or control judicial proceedings to pressure lawyers and interfere in their work.

79. The Special Rapporteur was alarmed to hear about the immense list of obstacles facing lawyers and the level of threats and attacks that some lawyers encounter on a daily basis merely because they wish to discharge their professional duties and represent the interests of their clients. Lawyers sometimes face insurmountable difficulties in their attempts to meet their clients in private and gain access to transcriptions of court hearings and copies of case materials. It is also allegedly not uncommon for investigators to forge lawyers' signatures on documents submitted to the courts. In some extreme cases, lawyers were not allowed on court premises. In most cases, judges condone or directly participate in such violations of lawyers' rights and privileges. As a consequence, in too many trials, lawyers have only a cosmetic role to play, no matter how convincing their arguments might be.

1. Lawyer-client confidentiality

80. Although prohibited by Russian legislation, a practice that seems to have developed in some regions is the interrogation of lawyers as witnesses in order to remove them from legal processes. The practice is in flagrant contradiction of the basic principle of lawyer-client confidentiality as enshrined, inter alia, in principle 22 of the Basic Principles on the Role of Lawyers.

2. Pressure, threats, attacks and killings

81. In some regions of the Russian Federation, lawyers are targeted for discharging their professional functions. Lawyers are subjected to threats, intimidation, attacks, groundless prosecutions, and in the gravest cases, murder. The perpetrators are both State and non-State actors. The situation of lawyers who work in the North Caucasus is of particular concern to the Special Rapporteur. In the context of terrorism and counter-terrorism activities, courageous lawyers who continue to discharge their professional duties live in a state of permanent fear.

82. Lawyers involved in politically sensitive cases are also particularly vulnerable to pressure and regularly face security threats.

83. In many regions of the country, the impunity surrounding such acts of persecution has had a strong chilling effect on lawyers, negatively influencing the quality of their work, forcing them to refuse to work on certain types of cases, and obliging them to face the fear that they or their families may be at risk because of their work.

I. Training and capacity-building

84. Most of the people the Special Rapporteur met during her visit recognized the importance of high-quality education, professional training and capacity-building programmes for all the actors in the judicial system in order to ensure an independent, impartial and effective administration of justice.

85. The Russian Academy of Justice, created in 1998, provides regular courses and training for judges and court staff at all levels. The Academy also includes a law school which trains about 80,000 students. The Academy suffers from limited funding — its resources come from the State — and limited access to technology, such as video-conferencing, which could facilitate the provision of training.

86. As previously mentioned, the law requires newly appointed judges to undertake initial practical training. Continuing education was also made compulsory for judges, who have to undertake training every three years. The Special Rapporteur was informed that such trainings usually take place at the Russian Academy of Justice.

87. Assessing the effectiveness of the training is not a straightforward matter, but some interlocutors reported to the Special Rapporteur that, even after attending the training provided by the Academy, many judges continue to be unaware of legislation concerning immigration and refugees and regional and international human rights and the jurisprudence of the European Court.

IV. Conclusions

88. **In December 2013, the Russian Federation celebrated the 20th anniversary of its Constitution. Since the end of the Soviet regime, the justice system has been heavily reformed to respond to the founding requirements of democracy and the rule of law.**

89. **While all the efforts to strengthen the independence of the judiciary and end the political subordination of judicial actors are welcome, the reform programmes, including new legislation, have yet to be fully implemented. All the stakeholders in the justice system, including civil society, should be involved in the implementation of the reforms and new laws, so that the Russian Federation can move forward in its consolidation of democracy.**

90. **It is of paramount importance that both the public and the authorities, including the judiciary, fully internalize the changes brought about by the end of the Soviet system in order to get away from the public perception that the justice system is a remnant of the old regime. That will require specific action based on the democratic concepts introduced by the Constitution. Indeed, it is equally important that justice be done and be perceived to be done. Any lack of public trust has to be urgently addressed and specific measures taken to reconnect the public with a judiciary that exists to enforce their rights. One such measure should be the immediate prohibition of cages in criminal courts in order to uphold the principle of the presumption of innocence, thereby reinforcing fair trial guarantees.**

91. **The Special Rapporteur wishes to highlight the fact that the independence of the judiciary as a key element of democracy encompasses both the independence of individual judges and the institutional independence of the judiciary as a whole. Any improper interference in the independence of the judiciary, such as the appointment of judges by the executive, must therefore be avoided. Moreover, pressure on, threats against, and in the most extreme cases, murders of judges and lawyers in total impunity cannot be tolerated. Any kind of direct or indirect threat or improper influence, interference or pressure on judges, prosecutors or lawyers must be tackled immediately in order to prevent serious setbacks for the independence of the justice system and the implementation of the rule of law in the Russian Federation.**

92. **The Special Rapporteur recalls that it is of utmost importance to ensure that the successes achieved thus far are maintained while moving forward with a comprehensive set of short- and long-term measures aimed at addressing the issues and challenges that have been identified.**

V. Recommendations

93. The Special Rapporteur wishes to make the following recommendations with a view to contributing to the reinforcement of the independence and impartiality of the justice system. She notes with concern that many of the issues raised by the former Special Rapporteur in 2008 have not yet been addressed and that a number of his recommendations have yet to be implemented.

Government judicial reform plan

94. The new government justice reform plan for 2013–2020 should be implemented with the full and informed participation of members of the judiciary, including members of the Supreme Court, as well as other stakeholders such as lawyers and members of bar associations. The Special Rapporteur would welcome additional information on the measures the federal authorities intend to take to implement the new programme and assess its results.

Independence of the judiciary

95. All State institutions in the Russian Federation should respect and uphold the independence of the judiciary. Interference and threats to the institutional and individual independence of judges should be addressed as a matter of urgency, investigations should be carried out when necessary and perpetrators should be prosecuted and punished. Specific measures to safeguard the justice system and protect judges should be taken and implemented in practice.

96. The selection of candidates for the position of judge must be based on merit alone and undertaken through competitive, objective and transparent examinations conducted at least partly in a written and anonymous manner.

97. All judges should be selected and appointed by an independent body, which should have a plural and balanced composition, and in which judges have a substantial voice. In this sense, the composition of the qualification collegia and the procedures for appointing their members should be reviewed, and measures taken to ensure their full independence and avoid political influence. Judges should not be appointed by the executive.

98. Selection and appointment procedures should be transparent and public access to relevant records ensured.

99. All judges, including justices of the peace, should receive life tenure.

100. Clear procedures and objective criteria for the promotion of judges should be followed.

101. The role and powers of court presidents should be clearly defined and limited to the proper administration of the court. The principle of *primus inter pares* should be respected and court presidents should be elected by the judges of their respective courts; any involvement of the executive or the legislative power in the election process should be excluded.

Accountability

102. The gravity of conducts, which determines the kind of disciplinary measure to be applied, should be clearly established. Judges' right to a fair hearing and review of

the decision by an independent body should be respected in all disciplinary proceedings.

103. Relevant legislation and standards should clearly indicate that the fact that a judge's decision, no matter how controversial, is overturned by a higher instance court does not itself constitute a valid ground for disciplinary action. It is the role of the appeal courts to correct judicial errors.

104. Any information pointing to the inappropriate conduct of a judge should be brought to the attention of the relevant qualification collegium and investigated in accordance with the appropriate procedures within the new limitation period.

105. An independent body should be in charge of disciplining judges. In addition to the recommendation in paragraph 97 above, the separation of the qualification collegia into two bodies – one in charge of the qualification, selection, appointment and promotion of judges, and the other dealing with disciplinary proceedings – should be considered.

106. The jurisdiction of the Disciplinary Judicial Presence, thus far limited to appeals against dismissals of judges, should be extended to the other forms of disciplinary measures.

107. The inclusion of one or more judges of the Constitutional Court in the composition of the Disciplinary Judicial Presence should be considered.

Administration of justice and judicial proceedings

108. Efforts to modernize courts should be strengthened. The use of technology, including the Internet, databases and videoconferencing, should be streamlined throughout the country at both federal and regional levels.

109. Where they do not exist already, objective and transparent mechanisms should be put in place for allocating cases to individual judges. Information and criteria on the assignment of cases should be available to the public in order to counter suspicions of malpractice and corruption.

110. Court hearings should be properly recorded; the records should be available to all interested persons, especially the parties to the proceedings.

111. Pretrial detention should be the exception rather than the rule, and based on an individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors to determine pretrial detention should be specified in law and should not be vague or expansive.

112. Judges should always justify their decisions in accordance with the law to maintain a defendant in pretrial detention.

113. The law should stipulate that, if the length of time the defendant has been detained reaches the length of the highest sentence that could be imposed for the crimes charged, the defendant should be immediately released. Pretrial detention in cases of violations for which the highest possible sentence is a fine should be prohibited in law, as it does not comply with the requirement to be reasonable.

114. Explicit time limits on the length of pretrial detention for serious crimes should be respected.

115. Respect for the principles of equality of arms and presumption of innocence should be reinforced. In particular, metal cages and closed wooden boxes should be removed from court rooms immediately.

116. Defence lawyers should have access to investigative bodies' files and all the evidence they compile during the investigative phase, and the right to make copies.

117. Allegations of torture, including torture to extract confessions, should be investigated immediately in an impartial and effective way.

118. The special unit created in 2012 within the investigative committee to deal with crimes committed by law enforcement representatives should be provided with the necessary human and financial resources to operate and yield tangible results.

Jury courts

119. The jurisdiction of jury courts should not be limited.

120. The system of selecting jurors should be reformed to exclude the possibility of arbitrary selection. The system should automatically exclude State agents and other persons whose service as jurors would present a conflict of interests.

Execution of judicial decisions

121. Efforts to improve the execution of domestic and international judicial decisions should be strengthened. An independent mechanism should be established at the federal level and provided with the necessary resources to oversee the enforcement of judicial decisions at all levels and with the competence to recommend action to remedy situations in which it considers that judicial decisions have not been properly and/or fully executed. Its functions should also include gathering and publishing statistical data on the execution of judicial decisions.

122. Specific measures, including measures to tackle corruption, should be adopted urgently to improve the effectiveness and transparency of the work of bailiffs and other actors in charge of enforcing judicial decisions. Closer cooperation between bailiffs and the courts should be institutionalized.

123. The judgments of the European Court of Human Rights concerning the Russian Federation should be duly enforced and official translations into Russian made available on a public database in order to make them easily accessible.

Legal aid

124. A federal legal framework should be adopted to establish a comprehensive legal aid system that is accessible, effective, sustainable and credible in all the entities of the Federation. The framework should (a) include the broadest possible definition of legal aid and specific criteria to determine eligibility for legal aid; (b) ensure that legal assistance is provided at all stages of the criminal justice process and in any non-criminal judicial or extrajudicial procedure aimed at determining rights and obligations; (c) ensure that information on legal aid is widely available to the general public; and (d) determine the minimum qualifications and training of all professionals working for the legal aid system.

125. Defence lawyers appointed to provide legal assistance in criminal cases should be adequately remunerated for all their services.

126. The Russian authorities should recognize and support the contribution of NGOs in providing legal aid. The authorities should adopt all appropriate measures to ensure that non-governmental legal aid providers are able to carry out their work effectively, freely, independently, and without any intimidation, harassment or

improper interference. The authorities should put an immediate stop to groundless inspections, investigations and prosecutions of NGOs.

Administrative court system

127. A comprehensive administrative procedural code should be adopted. All relevant stakeholders should be able to contribute to and participate in discussions on the content of the code.

128. Specific steps should be taken to establish an administrative court system as a means of contributing to the fight against impunity for violations or omissions committed by State agents, including corruption, and to strengthen public confidence in the justice system. Specific training should be provided for administrative court judges.

Juvenile justice

129. The adoption and implementation of a comprehensive and inclusive framework for juvenile justice, based on international standards and principles on children's rights, should be seriously considered at the federal level. Juvenile justice models, such as the one developed in the Rostov region, should be encouraged and serve as examples for all entities of the Federation.

Prosecution services

130. Prosecutors should conduct themselves in a professional manner at all times and strive to be, and to be seen to be, independent and impartial. They should not try to directly or indirectly pressure or influence judges.

131. Prosecutors should cooperate with the legal profession and public defenders and ensure that the rights to a fair trial and to adequate access to legal defence are respected.

132. The dismissal of prosecutors should be subject to strict criteria that are established by law and that do not undermine the independent and impartial performance of their functions.

133. The grounds for the supervisory powers of the prosecution should be reduced and the procedure should be clarified in the law.

Lawyers

134. The bar should be consulted on any legislative procedures that could affect the rights and independence of the legal profession.

135. Responsibility for the registration of lawyers should be transferred from the Ministry of Justice to the legal profession itself. Qualification boards should be composed of legal professionals only; representatives of all government entities, including the Ministry of Justice, should be excluded from participating.

136. Legislation should be adopted to guarantee that lawyers have full access to the relevant information, files and documents in the authorities' possession or control to allow them to prepare an adequate defence. The information concerned should include all materials that are exculpatory or that the prosecution plans to use against the accused in court.

137. The authorities, together with bar associations and educational institutions, should ensure that lawyers receive proper training and are made aware of lawyers' ethical duties and the human rights and fundamental freedoms enshrined in domestic and international law.

138. Any acts of harassment, threats or physical assaults against lawyers, including killings, should be promptly investigated by an impartial and independent body and the perpetrators sanctioned.

139. Where the security of lawyers is threatened as a result of discharging their functions, the authorities should adopt effective measures to ensure their security and that of their families.

Capacity-building

140. Judges, prosecutors and lawyers should have access to adequate legal and professional training, including continuing education, specialized training and other kinds of capacity-building. The training should include specific courses on international and regional human rights law and its application at the domestic level.

141. Training opportunities should be equally accessible to all judicial actors, regardless of the instance at which they operate and the distance from the capital.